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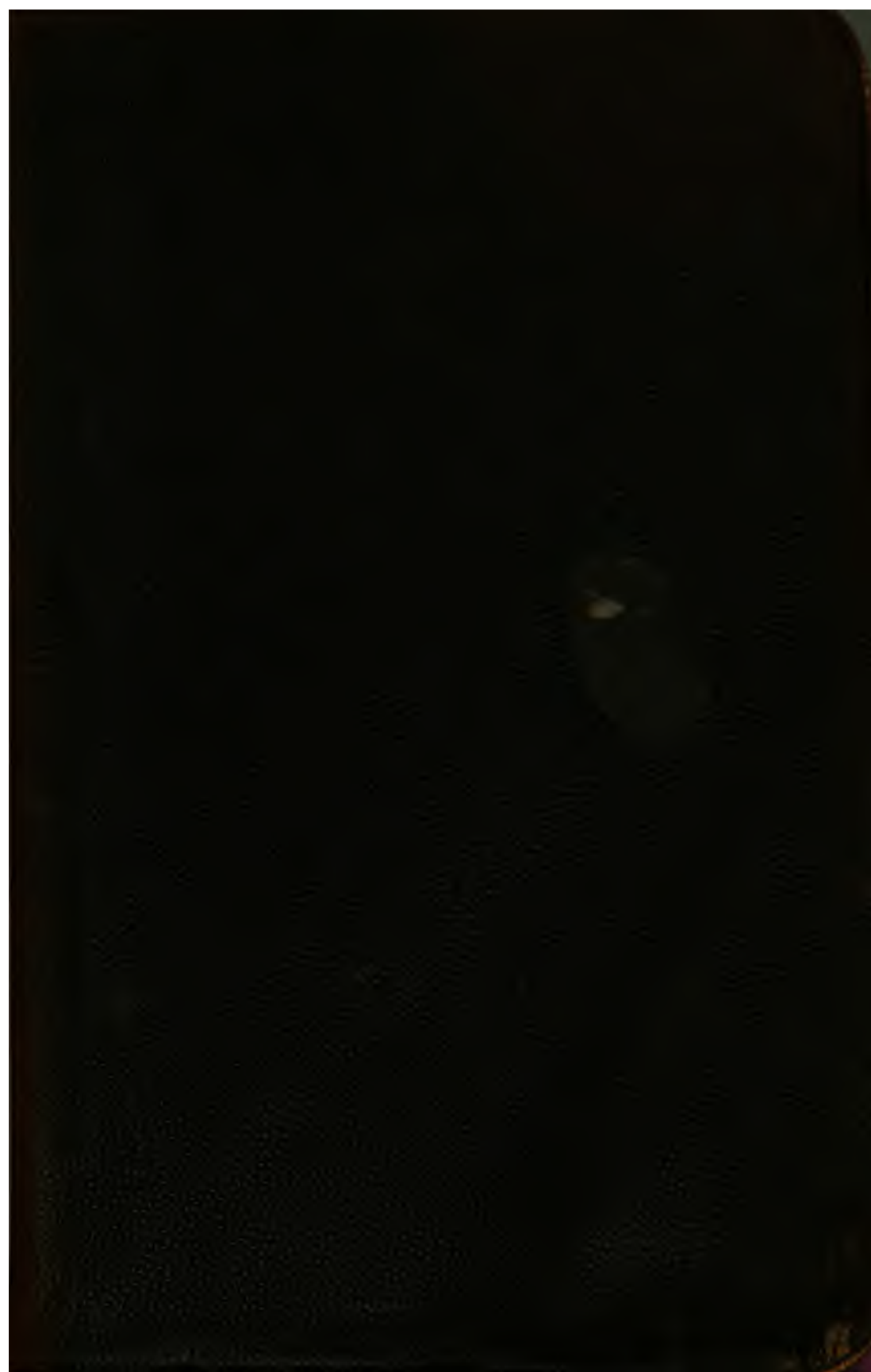
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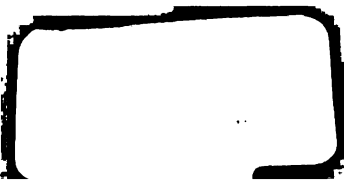
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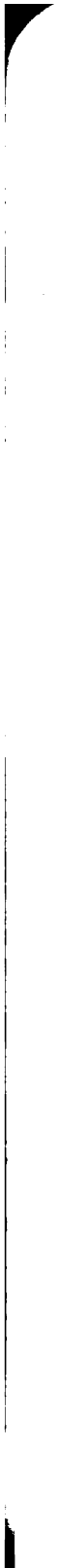


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Modern American Law

*A Systematic and Comprehensive Commentary on the
Fundamental Principles of American Law and Pro-
cedure, Accompanied by Leading Illustrative
Cases and Legal Forms, with a Revised
Edition of Blackstone's Commentaries*

PREPARED BY

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AND WRITERS ON LEGAL SUBJECTS

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Modern American Law

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PREFACE

The principles of law covered in Volume XIII of Modern American Law are attracting the close study of the members of the legal profession, our public servants and the layman.

Professor Bruce Wyman, A.M., LL.B., formerly of the Harvard Law School faculty, is the author of the first treatise in this volume, "Law of Public Service Companies—Especially Common Carriers." He gives a masterful presentation of its governing principles and offers an exceptional opportunity to study the important phases of this modern branch of the law.

The rules governing the incorporation, rights and duties of municipal corporations are faithfully given in "Law of Municipal Corporations," by Dean Henry H. Ingersoll, M.A., LL.D., of the Law School, University of Tennessee. The rapid growth of American municipalities has greatly increased the relative importance of this highly interesting subject.

"Law of Public Officers and Elections," by Professor Edwin Maxey, D.C.L., LL.D., is the third subject in the volume. The demand for approved methods in conducting public office today has made a knowledge of the law of public officers essential to

the officeholder and desirable to the citizen. The rules underlying this subject, as well as those regulating elections, are clearly outlined by the author.

A treatise on "Parliamentary Law" is included herein. This lucid exposition of the rules adopted by assemblies for the conduct of business is by Professor John H. Perry, M.A., LL.B., of Yale University. No man can be said to be law trained without a knowledge of this subject.

A careful study of the absorbing contents of this volume will make for better judges, better public officers, better lawyers and better citizens.

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LAW OF PUBLIC SERVICE COMPANIES—ESPECIALLY COMMON CARRIERS

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PART I

ESTABLISHMENT OF PUBLIC DUTY

CHAPTER I.

PUBLIC EMPLOYMENT.

1. **Public employment distinguished from private business.**—From the beginnings of our law to the present time the distinction between public employments and private business has been considered fundamental. All businesses both public and private are subject to that general police power of the state whereby in any civilized society the effort is made to promote the general welfare by positive law. But any comparison of the large amount of systematic coercion which it is considered proper

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for the state to impose upon public services with the small extent of the regulating power over private businesses is in itself significant enough. Those in a public calling have always been under the extraordinary duty to serve all comers whether it was agreeable or not, while those in a private business may always refuse to serve if they choose. In public business one must serve all who apply without making unreasonable conditions, provide adequate facilities to meet indicated demands, exact only reasonable charges for services rendered, and between customers similarly circumstanced make no discriminations. In private business, on the other hand, one may turn away whomsoever he chooses, manufacture such quantities as he pleases, demand any price which he can get, and give any rebates which are advantageous.

2. History of the public employments.—In the middle ages, as we view conditions through our earliest law reports, this distinction between public callings and private concerns was clearly made. Indeed, control of important employments went further then than it has ever gone since. The guild merchants controlled the sale of staples with a system of rules to protect the purchaser, just as the craft guilds saw to it that there was enough manufactured to supply the needs of the population. All this regulation of affairs by the state was felt to be for the benefit of the public as a whole, who could thus obtain, without favor at reasonable prices, proper service in accordance with their requirements. Thus the baker and the miller in the coun-

try villages were bound to serve all that applied or answer for it in the courts. Likewise the surgeon and the tailor in the towns had to answer to all calls upon their professions, or else subject themselves to the penalties of the law. Innkeeper and carrier then as now were at the service of the public, the innkeeper being subject to indictment if he turned away a weary wayfarer. Some of these employments are no longer on the list, and many others have been added. For it is the economic conditions of a given time which determine what businesses must be subjected to the coercive law of public service, and what employments can be left to the general regulation of natural forces. Times change, and the application of the law varies. At one time we are regulating canals and turnpikes, at a later time railroads and steamboats. At one time we are regulating the price of bread and boards, at another time of gas and electricity. But the fundamental principle remains, that, whenever in any employment the conditions give those who conduct it virtual control over their patrons in a matter necessary to their welfare, the law steps in and compels the performance of that service in accordance with the requirements of the public.

3. The public services of the present day.—Whatever way we turn today we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers—railroads and steamships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are

various transportation services at our disposal—railroads and ships, express companies and dispatch lines, refrigerator lines and tank cars. If we are journeying we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to—for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually (except the last two) by private companies in public service, and subject to the law governing public service, even when provided by the municipality itself. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

4. Control of the public services necessary.—The test here suggested is this: whether a business is public or not depends upon the situation of the public with respect to it. Wherever there is in private hands substantial control of public necessities it may well be said that the public has now an interest in the conduct of these businesses by their owners. Since these agencies are carried on in a

manner to make them of public consequence, they have become affected with a public interest. Therefore, as the old books say, having devoted their property to a use in which the public has an interest, the owners in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Only a generation ago the general feeling as to every sort of industrial relation was that it was better to leave people to work out their own industrial salvation. But of late years we have been calling upon the state to save us from the abuse of monopoly in all its forms, and we are impatient if the state delays. It is only a few years since that we have had any detailed law for the regulation of public services. If they did not refuse to render their usual service, and did not charge extortionate prices, little fault was ever found with them in the last generation. Now we are demanding of them the utmost service which they are capable of rendering, upon the terms of full equality for the whole public. If they do not increase their facilities to meet the needs of their growing business, and if they give one customer in any way the least advantage over another, we sternly call their owners to account.

5. The effect of natural monopoly.—The case for public service is plainest in those few utilities where there are natural limitations upon the sources of supply which are essential to the business. This situation in itself gives some degree of monopoly to those who control the sources of supply

most accessible to their market, in preventing effective competition with the local service already established. Thus those who control the most advantageous watershed have a natural monopoly of the supply of water in a given district; and so by established law the waterworks organized to distribute water to a community must supply all that apply to the extent of their undertaking.¹ So too an irrigation system by which a stream is impounded and its water is distributed over lands within its flow has a public character.² Sites where waterpower may be developed to greatest advantage are necessarily limited; and, if the enterprise contemplates the sale of waterpower at a certain canal to various users, it would seem that there should be no discrimination therein.³ For like reasons those who have pre-empted the natural gas fields must deal without discrimination with the public which they have assumed to serve therefrom.⁴ All members of the public within the range of the operations of these systems may demand that the law put them upon an equality with their neighbors in obtaining these services so necessary to their welfare. For were not the law ready to act in their behalf there would be the gravest danger of intolerable injustice.

6. Difficulty of distribution as a factor.—Another natural limitation upon competition results from the character of the product. If the physical

¹ *Haugen v. Albina Light & Water Co.*, 21 Ore. 411, 28 Pac. 244, LEADING ILLUSTRATIVE CASES.

² *Wheeler v. No. Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. 487.

³ *Sammons v. Kearney Power & Irr. Co.*, 77 Neb. 580, 110 N. W. 308.

⁴ *State ex rel. Wood v. Consumers Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674.

characteristics of the product are such that it can only have a local distribution the barrier against outside competition may fairly be said to be natural. What after all is that element in the situation which makes the selling of gas a public employment,⁵ while the vending of candles is a private business? Is it not that the box of candles may be sent from any factory to compete in any market, while a thousand cubic feet of gas can only be obtained in any particular community from the pipes of the local company. Much the same argument could be made in differentiating the supplying of electricity⁶ from the sale of energy in the shape of coal; and indeed electric lighting was held to be a public service from the first moment of its installation upon a public basis. Electricity must be distributed over a wiring system as it is made; it cannot be transported independently and stored indefinitely. The purpose for which the supply is used would seem to be immaterial so long as a public need is satisfied. Nevertheless, there have been some doubts raised about the public status of an electric company supplying power exclusively.⁷ To give a modern example of a public employment made such by the special character of the product supplied and the peculiar necessities of the local public, one might instance the ice-plants in the southern cities.⁸ It

⁵ *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539.

⁶ *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, LEADING ILLUSTRATIVE CASES.

⁷ *Jones v. North Georgia Electric Co.*, 125 Ga. 618, 54 S. E. 85, holding such service public as the majority of courts do; but see *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, holding to the contrary.

⁸ *Rhinehart v. Redfield*, 93 N. Y. App. Div. 410, 87 N. Y. Supp. 789.

is predicted with confidence that ice-plants will henceforth be found upon the list of those businesses so important to the public that they can no longer be left to private hands without public control.

7. Scarcity of advantageous sites.—The sites upon which certain services can be conducted to best advantage are few in number. In *Munn. v. Illinois*⁹ (perhaps the leading case upon public employment) the Supreme Court spoke of the grain elevators as taking toll at the gateways of commerce. Likewise the owners of the established docks¹⁰ obviously command the situation; and this is the explanation of the fact that wharfingers are held to serve the public. The necessity of these locations to proper conduct of the business may be so great that those who are possessed of these sites may well be said to enjoy a natural monopoly; since if others venture to establish themselves at all at such disadvantage, their competition will be comparatively ineffectual. At all events, those in the favorable locations could exact higher prices than would be fair, were it not for the fact that the law intervenes. Terminal facilities, such as union stations,¹¹ furnish the most striking examples of this importance of particular sites; and there are cases compelling them to take in all railroads desiring entrance. To a lesser extent this is true of those services, which although not dependent upon an

⁹ 94 U. S. 113, LEADING ILLUSTRATIVE CASES.

¹⁰ *Macon D. & S. R. R. Co. v. Graham & Ward*, 117 Ga. 555, 43 S. E. 1000.

¹¹ *State ex rel. v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 So. 221.

exact location, are operated with peculiar advantage in particular areas, such as stockyards.¹²

8. **Limitation of available time.**—Another obvious restriction upon effective competition results from limitation of time. When the need of the applicant is immediate, the person from whom he asks service has an unfair advantage. It is this instant need which gives to those agencies established for the rapid transmission of intelligence that virtual monopoly which the earlier telegraph¹³ and the later telephone¹⁴ have always had. The very nature of their business is such that one must deal with the established plant upon whatever terms its owners are allowed to make. This is equally true of news-gathering agencies, such as the press bureau¹⁵ and the stock tickers.¹⁶ There are those who must have this service in their business or they cannot get on at all in competition with their rivals. Thus the law must step in and see to it that only reasonable rates are imposed. In these businesses public regulation of the service furnished is peculiarly necessary, or else public needs will not be met. There are other ways of sending communications—by mail or by messenger—but since time is of the essence here they are not effective substitutes. It is not accidental that the telephone cases and the associated

¹² *Ratcliff v. Wichita Union Stockyards Co.*, 74 Kans. 1, 86 Pac. 150.

¹³ *Green v. Western Union Telegraph Co.*, 136 N. C. 489, 49 S. E. 165, LEADING ILLUSTRATIVE CASES.

¹⁴ *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. 257, LEADING ILLUSTRATIVE CASES.

¹⁵ *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, LEADING ILLUSTRATIVE CASES.

¹⁶ *Shepard v. Gold & Stock Telegraph Co.*, 38 Hun 338 (N. Y.).

press cases furnish the best discussion of the fundamental basis of the special law of public employment. Obviously this coercive law is imperatively required to meet the monopolistic conditions surrounding these peculiar services.

9. Economic limitations create public employment.—The conditions which may produce virtual monopoly, such as natural sources of supply, restricted opportunities of access, limited time at disposal and difficulties in distribution have just been discussed. But of almost equal importance are other factors producing true economic monopoly by deterring effectual competition, such as the cost of the plant, the large scale upon which the business is done, the absence of effectual substitutes and the dependent position of the particular service. These elements in the general situation have doubtless already been taken into account unconsciously; but they are of such importance as to deserve mention. These economic forces of various sorts may, either singly or in combination with others, naturally result in a given business in a monopoly of a sort which bids fair to be permanently characteristic of that employment. In these businesses with which we are dealing, the larger the scale upon which the business is done, the lower the cost of performing the service. In such businesses there must be such great sums expended in construction of the plant that none would venture to sink an equal sum in a competing service at the risk of total loss in case of failure. The common fact therefore in all instances of public employment is virtual monopoly

so established in the nature of things that society must reckon with it. And it matters not by what conditions this situation is established so that it has the elements of permanence.

10. Legal privileges accompanying public employment.—That legal privileges frequently accompany public employment is a coincidence that has struck many observers as a characteristic of the whole class. It is, indeed, common to find in the case of public employments of all sorts the enjoyment of an exclusive franchise, or the exercise of eminent domain, the use of the streets, or even a direct grant from the public treasury. The common argument is that because these businesses have been granted these privileges they have thereby acquired their public character. It is submitted, however, that under our constitutional system no special privileges can be granted except for a public purpose; for, unless there is public interest apparent, the grant is void. We have seen already that the conditions of virtual monopoly, however caused, may give rise to public calling, even when the state has had no hand in the establishment of the situation. There are extrinsic conditions by which it is to be determined what businesses are affected with a public interest; and the law must here as elsewhere deal with existing facts. Public privileges may be given only to a business public in character; and public regulation of such businesses only is justifiable. The power to recognize what those businesses are depends upon our experience and what our insight into the situation teaches us.

CHAPTER II.

PUBLIC PROFESSION.

11. **Public profession an essential.**—It has been insisted upon from the earliest times that we must find public service voluntarily undertaken in order to hold one to the special obligations of this peculiar law. The early cases spoke of the profession of his trade for the public good which one made by publicly vesting an interest in himself in all that would employ him. An innkeeper who erected his sign, it was said, thereby charged himself to the commonwealth, and his property was therefore in effect dedicated to public use. The same principles still prevail, although our modern language is less picturesque. Even one who has acquired a virtual monopoly is not forced into public service against his will; it is only when he has committed himself to public service that he is bound thereafter to deal with all indiscriminately. There is no complete case of public employment made out even when the business is public in character, if there has been in that particular case no profession to serve the public. Thus a lumberman may have a railway upon his lands without being under any obligation to transport goods for others. The converse of this is true, that there is no case of public employment made out if the business is private in character, however much eagerness to deal with the public may

have been evinced. No matter how flamboyant its advertisements, a dry goods store will not become thereby a public enterprise, subject to the peculiar obligations of public service, which our law imposes to prevent oppression.

12. **Solicitation of the public.**—When there has been general solicitation of the public there can be little doubt of the public profession. It is thus that a steamship line which advertises for freight indicates its character.¹⁷ And so a waterman who had the sign “lighterman” over his door was held to have professed public employment.¹⁸ The fundamental question here is whether the solicitor goes about making special contracts, or whether he lets people know generally that he is ready to deal with all comers as in regular course of business. Where a carter¹⁹ was soliciting business publicly in various ways, by signs upon his wagons and upon fences, by his cards and tags, it was held that these advertisements spoke for themselves, and unquestionably established the fact, independent of everything else in the case, that the truckman held himself out to the public. And where the proprietors of a hotel²⁰ ran a coach to the station to induce guests to come to the house and had a public register for all to sign, the court had little doubt that it was a public inn. Indeed, business campaigns are common enough in public employment, as everyone who follows advertising affairs must know.

¹⁷ *The Cape Charles*, 198 Fed. 346.

¹⁸ *Ingate v. Christie*, 3 Car. & K. 61 (Eng.), *LEADING ILLUSTRATIVE CASES*.

¹⁹ *Lloyd v. Haugh & K. S. & T. Co.*, 223 Pa. St. 148, 72 Atl. 516.

²⁰ *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 26 Pac. 1099.

13. Characteristics of public employment.—In-discriminate dealing with the general public is the chief characteristic of public service. The criterion is whether service is rendered particular persons chosen, or whether there is service offered to every one who comes along. Thus one who is transporting goods from place to place for hire as his principal occupation, for all that see fit to employ him, is a common carrier.²¹ By the same token the establishment by the innkeeper of a regular price for his entertainment is proof that the house is being conducted as a public one.²² The test in all cases, as will have been seen, is whether the service is being performed upon the regular basis of public employment. So a water company which accepts a charter for the supply of certain territory thereby commits itself to serve that community.²³ An irrigation company which has taken all applicants as they come along on the same terms has clearly put the enterprise upon a public basis.²⁴ If the service is thus habitually performed upon a public basis, the community affected is led to rely upon its continued maintenance upon a public basis. There has been a profession made to serve the public when the evidence shows that the public would naturally get the impression that the service is offered to all.

14. Indications of private business.—The chief characteristic of private dealing is the usual neces-

²¹ *Robertson & Co. v. Kennedy*, 2 Dana 430 (Ky.), LEADING ILLUSTRATIVE CASES.

²² *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 94 N. W. 874.

²³ *Lumbard v. Stearns*, 4 Cush. 60 (Mass.).

²⁴ *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 Pac. 332.

sity for special agreement with the proprietor, no regular course of business being followed. There is not the element of permanency in such dealing; it is generally regarded by all concerned as an incidental relation. Thus where a vessel is chartered for a special voyage, the charter being necessarily an isolated contract, the owner of the vessel is plainly not engaged in common carriage.²⁵ So a farmer who occasionally takes in for the night travelers coming his way is not held liable as an innkeeper—even if he usually accepts money therefor—since he plainly is not making tavern keeping his regular means of getting his livelihood.²⁶ Electric power is not being supplied upon a public basis where the whole output is delivered to a few concerns by special arrangement.²⁷ And telephone lines are commonly enough run through the neighborhood in rural districts as a private service for the particular subscribers.²⁸ A casual undertaking is not public service, nor is an intermittent employment. There must be a regular course of dealing in order to give commonly the impression that the service is being offered to all comers. Only in such cases does the public rely upon the service as always at its disposal.

15. Extent of public profession.—Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. One by enter-

²⁵ *Allen v. Sackrider*, 37 N. Y. 341, LEADING ILLUSTRATIVE CASES.

²⁶ *Lyon v. Smith, Morris* 184 (Iowa).

²⁷ *Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179.

²⁸ *Cumberland Tel. & Tel. Co. v. Cartwright Creek Tel. Co.*, 128 Ky. 395, 108 S. W. 875.

ing a public employment does not thereby undertake to perform every kind of service that may be asked of him; his obligation only extends to the sort of service that he has undertaken. Thus a carter need not take as a common carrier a great hogshead, much larger than the sort of thing he has facilities for carrying.²⁹ And so an express company, never having professed to take glass, need not assume responsibility for its breakage.³⁰ Railroads are undoubtedly created for the purpose of carrying all kinds of personal property; the American cases therefore hold that the railroad companies must take live stock upon a public basis.³¹ And if a railroad is carrying parcels upon passenger trains, it cannot while taking the newspapers of one publisher refuse those of another.³² It would follow that in every service of a public character the public generally may insist upon the performance of everything of the sort they would naturally expect to be done judged by what is being done. There is, indeed, a certain scope in every service so naturally expected that one undertaking the service commits himself to conducting the particular business according to its normal standard.

16. The case of separable services.—One is thus not necessarily committed to going beyond the general class within which his usual services fall; but he obviously may if he chooses expand his business

²⁹ *Tunnel & Short v. Pettijohn*, 2 Harr. 48 (Del.).

³⁰ *People v. Babcock*, 16 Hun 313 (N. Y.).

³¹ *Kansas Pac. R. Co. v. Nichols, Kennedy & Co.*, 9 Kans. 235.

³² *Memphis News Publishing Co. v. Southern Ry. Co.*, 110 Tenn. 684, 75 S. W. 941, LEADING ILLUSTRATIVE CASES.

to cover other separable services. A railroad is not necessarily a carrier of both passengers and goods, it may confine its service to one or the other. Thus there are freight railroads which carry no passengers, just as street railways need carry no freight.³³ But the innkeeper's business is held indivisible; he must supply both food and lodging, or he is not an innkeeper. Thus neither a lodging house nor a restaurant is an inn, notwithstanding there is in either case advertisement enough for general patronage.³⁴ A water company supplying householders and shopkeepers for domestic uses need not supply manufacturers and farmers for their peculiar needs.³⁵ And a gas company may confine its profession or be limited by its charter to the supply of gas either for illumination or for fuel.³⁶ Of course where two services have been voluntarily undertaken, both services or either are at the disposal of the public. The public have a right to the service which has been professed, although without the profession such extension of the service would not be obligatory.

17. Profession limited to facilities devoted.— One may set the exterior limits to the profession one is making; but one may not make interior limits. In other words, one is not bound to service outside of the profession which has been made, while one

³³ Compare *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450 (freight railroad) with *Thompson Houston Electric Co. v. Simon*, 20 Ore. 60, 25 Pac. 147 (passenger railway).

³⁴ See *Davis v. Gay*, 141 Mass. 531 (a lodging house) and *Block v. Sherry*, 43 N. Y. Misc. 342 (eating house).

³⁵ In *re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109.

³⁶ *State v. New Orleans Gas Light Co.*, 108 La. 67, 32 So. 179.

is bound to serve within the profession. This distinction may be illustrated by pointing out that a railroad is not bound to carry beyond the route which it has established.³⁷ But it must have cars enough to handle all business along its lines. Similarly a water company need not supply applicants outside the city, even if its aqueducts pass their premises;³⁸ but certainly it could not within the city refuse to supply applicants in a district through which its pipes run. So, too, an innkeeper is not bound to serve beyond the capacity of his house; but until it is exhausted he ought to receive all without discrimination.³⁹ A power company is not liable for not supplying new applicants after the flow of the stream is exhausted, although bound to accept applicants in proper order up to its capacity.⁴⁰ Perhaps in these last two instances it may also fairly be said that the extent of the innkeeper's profession is the dedication of his actual house to public service, and the whole profession of the power company is to divert the particular stream. Therefore, neither can be called upon to serve beyond its profession, while within its profession its public duty is plain.

18. Obligation of community service.—In various public services, however, the obligation assumed is obviously to serve the community as a whole. A gas plant or a waterworks, an electric

³⁷ *Pittsburg C. & St. L. Ry. Co. v. Morton*, 61 Ind. 539.

³⁸ *West Hartford v. Water Commissioners*, 68 Conn. 323, 36 Atl. 786.

³⁹ See *Browne v. Brandt*, (1902) 1 K. B. 696 (Eng.), **LEADING ILLUSTRATIVE CASES**.

⁴⁰ See *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785.

plant or a telephone system, cannot confine its service to the original lines; it will be obliged to increase its plant to meet the increasing demands of its public. This extension of the profession depends on the intention of the proprietors, or rather upon the impression which they give their community. Their original franchise is taken upon the basis of a general obligation to serve the community. They really undertake to meet the needs of the community they are serving. Of course these companies must at least furnish service at all premises within the lines which mark the territorial limits of the established system.⁴¹ But it would be going too far to say, as one case did, that all within the municipal limits, however remote from the established mains, may demand service.⁴² The modern law, however, requires that the existing service must be extended with the expansion of the densely populated area.⁴³ Probably the best rule for this matter is that contained in a recent decision suggesting that this expansion must keep pace with the reasonable expectation of eventual profit.⁴⁴

19. Withdrawal of the profession.—Since one comes into public service only by voluntarily engaging in the particular business upon a public basis, it would seem to follow that one could get out of public employment simply by publicly withdraw-

⁴¹ *Crouch v. Arnett*, 71 Kans. 49, 79 Pac. 1086, LEADING ILLUSTRATIVE CASES.

⁴² *Bothwell v. Consumers Co.*, 13 Idaho 568, 92 Pac. 533.

⁴³ *Birmingham Water Wks. v. Birmingham*, 58 So. 204 (Ala.).

⁴⁴ *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

ing his original profession. In a recent case in the Supreme Court it was assumed as unquestionable that a wharf which had once been a public landing could be turned back to private use.⁴⁵ The existence of a charter seems to complicate the situation, although it is not apparent why it should. Where the charter is mandatory it must be obeyed and the whole service maintained even though at a loss, at least until the company is prepared to forfeit its charter. But where the charter is permissive it would seem that there is no obligation other than the general obligations which have just been discussed. Nevertheless there are many cases holding that railways must maintain their whole service; and they cannot according to these cases, therefore, abandon a branch line.⁴⁶ It would seem, however, as the better authorities hold, that any separable part of the service may be abandoned, as for instance passenger service upon a railroad line.⁴⁷ Surely where the business is now conducted upon a private basis, as a private pipe line system, for example, there should be no power to compel involuntary service.⁴⁸

20. Reasonable notice of withdrawal.—The parallel between entering public service and quitting it is not quite perfect; for although one may enter upon public service on public notice without preparing the public for his advent, one may not,

⁴⁵ *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345, 29 Sup. Ct. 661.

⁴⁶ *Colo. & So. Ry. Co. v. R. R. Commission*, 54 Colo. 64, 129 Pac. 506.

⁴⁷ *Com. v. Fitchburg R. R.*, 12 Gray 180 (Mass.).

⁴⁸ *Prairie O. & G. Co. v. United States*, 204 Fed. 798.

it seems, abandon public service without notice to the public. The new element of a public duty now existing has supervened, which must be reckoned with when one who has assumed a public employment would lay it down. An innkeeper cannot without notice take down his sign at nightfall, nor a carrier abandon his schedule without warning to his public. This means that there is a public duty in the matter to give reasonable notice of the intention to abandon, which is owed the public, although after reasonable notice the public may be left to get service elsewhere. There are instances in the books of the granting of temporary orders to prevent a water company which had threatened cutting off an established service from taking sudden action.⁴⁹ And so a railroad will be enjoined from taking up a spur over which shipments are now being made.⁵⁰ Where one service is substituted for another, however, as where a new line is built in place of an old, little notice need be given.⁵¹ And electric companies may divide territory between themselves without consulting their patrons.⁵²

⁴⁹ *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260, 20 So. 742.

⁵⁰ *Durden v. Southern Ry. Co.*, 2 Ga. App. 66, 58 S. E. 299.

⁵¹ *Whalen v. Baltimore & O. R. R.*, 108 Md. 11, 69 Atl. 390.

⁵² *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101, LEADING ILLUSTRATIVE CASES.

CHAPTER III.

PUBLIC DUTY.

21. **Nature of public duty.**—It has thus always been the law that some kinds of business were of special importance to the public, and that all persons engaged in such businesses owed the public peculiar duties. And, as has been seen, although no one can be compelled to enter upon the employment, if he chooses to do so, he thereby undertakes the performance of the public duties connected with it. The situation is one which the law must meet by imposing obligations corresponding to the necessities of the case. The law makes it clear that any one who decides to undertake a public employment thereby commits himself to performing that service in the way which the law says that the conditions demand for the protection of the public. This duty placed upon everyone exercising a public calling is primarily a duty to serve every man who is a member of the public needing that service. Implicit in this primary duty, necessarily involved in its full performance, are various requirements. Not only must all be served, they must have adequate service; not only must they not be charged extortionate rates, but there must be no discrimination practiced. In such an elaborated statement there is not more than the plain recital of the present recognition of different aspects of public duty. But it will

be noted that the duty to serve the public is the fundamental principle from which all the rules of public service may be derived.

22. Character of the obligation.—It is somewhat difficult to place this exceptional duty in our legal system. It is like the contractual obligation in that it is an affirmative duty to act for a certain person; but it is different in that it does not depend upon assent of the party charged. It is like the obligation in tort in that it is imposed by law; but it is not cast upon anyone against his will as is the obligation in tort. In one sense the obligation to serve the public is voluntarily assumed; one is not committed to this service without his assent. But once this obligation is established by his undertaking, his duty extends to all within the profession, however unwilling he may be in a particular case to render service. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.⁵³ Therefore injuries received in cases of this description are not violations of contracts between the parties, but are breaches of the duty imposed by law upon the carrier; they are torts.⁵⁴ Thus one who is injured while being carried on Sunday can recover for the failure of the carrier in performing his undertaking, as he is not forced to make out his case by showing a contract.⁵⁵

⁵³ The language is that of Chief Justice Dallas in *Bretherton v. Wood*, 3 Brod. & Bing. 54 (Eng.), LEADING ILLUSTRATIVE CASES.

⁵⁴ The language is that of Chief Justice Taney in *Saltonstall v. Stockton*, Taney 11 (U. S.).

⁵⁵ *Carroll v. Staten Is. R. R. Co.*, 58 N. Y. 126.

And so the obligations of an innkeeper towards his guest are those which the law attaches to this status, irrespective of whether the parties in the particular instance may have made any agreement covering the contingency.⁵⁶

23. Real party in interest.—It is commonly said of public employments that the whole public is peculiarly interested in having them carried on. But this should be no justification for giving a private right to any person not clearly entitled thereto. Most of the American cases permit the sendee of a telegram to recover damages for fault of the company in the transmission of the message.⁵⁷ But such an action it seems may only be justified when it appears that the sendee and not the sender is the real party in interest. A similar conflict arises when a suit is brought by a householder whose premises have been destroyed by fire against the water company supplying the district. The cases are divided as to whether he may recover damages in his own right for the failure to maintain water pressure sufficient to cope with fires.⁵⁸ This public duty is necessarily limited to responding to the proper applications of those who are desirous of the sort of service which has been professed. A householder using electricity for lighting his house will seek in vain to have the gas company compelled by the courts to continue to maintain its connec-

⁵⁶ *Holland v. Pack*, Peck 151 (Tenn.).

⁵⁷ For a discussion of the authorities, see *Western Union Telegraph Co. v. Allen*, 66 Miss. 549, 6 So. 461.

⁵⁸ For a discussion of the authorities, see *Lovejoy v. Bessemer Water Works Co.*, 146 Ala. 374, 41 So. 76.

tions for his occasional use.⁵⁹ And one who is applying for service with the desire simply of being refused service so as to bring a law suit, will defeat his own ends.⁶⁰

24. Nature of the relationship.—The condition under which public service is performed is, therefore, not similar to contract, but is more like status. It would be difficult to find present all the essential elements of contract in arranging for public service. And it would be impossible to find all the obligations of the status in any agreement which the parties actually make. The applicant need not even have the capacity to contract; an infant or a married woman may demand service.⁶¹ Nor need the proprietor himself be capable; a man not sane enough to make contracts or a corporation acting beyond its powers cannot escape.⁶² The relationship is established by actual acceptance, although the payment is made by another person.⁶³ But the relationship itself is so personal that the right to have the service completed may not be assigned.⁶⁴ It is but a half truth that those who commit themselves to a public employment are bound to serve the whole public. It is but a half truth that the public servant may altogether decide as to the ex-

⁵⁹ *Fleming v. Montgomery Light Co.*, 100 Ala. 657, 13 So. 618, **LEADING ILLUSTRATIVE CASES**.

⁶⁰ *Southern Pacific Co. v. Robinson*, 132 Cal. 458, 64 Pac. 572.

⁶¹ *Watson v. Cross*, 2 Duv. 147 (Ky.), (infant). *Vanderberg v. Kansas City, Missouri, Gas Co.*, 126 Mo. App. 600, 105 S. W. 17 (married woman).

⁶² *Cross v. Andrews*, Cro. Eliz. 622 (Eng.), (insane proprietor); *Albion Lumber Co. v. De Nobra*, 72 Fed. 739 (ultra vires corporation).

⁶³ *Mims v. Seaboard Air Line Ry.*, 69 S. C. 338, 48 S. E. 269.

⁶⁴ *Sullivan v. Chicago Bd. of Trade*, 111 Ill. App. 492.

tent to which he will commit himself to public service. The real truth is that by entering upon the service one comes within the law requiring him to meet the necessities of the situation—but no more. The obligations are thus the involuntary ones of a legal status—not the defined ones of a specific assumption.

25. **Special needs of travelers.**—The duty as thus defined is not to all men, but to a certain public limited in various ways according to the necessary profession. An innkeeper or a carrier does not owe a duty to all who apply, but only to wayfarers and travelers. The innkeeper need not entertain a resident of his own town;⁶⁵ and a carrier need not take as a passenger one who wants to sell things while he is on board.⁶⁶ It is only as to dealings with travelers that these callings have been felt to be affected with a public interest. There is special reason in the nature of the case why innkeepers should be bound to entertain weary wayfarers, and why carriers of passengers must take up travelers bound their way. Moreover, it is well agreed that the innkeeper and the carrier are under a similar duty to the patron to receive persons incidentally affected by the principal service. The innkeeper must treat one summoned by the guest to a call upon him at his inn with the same consideration as the guest himself.⁶⁷ A person who comes to the carrier's premises in order to be of assistance to the

⁶⁵ *Meacham v. Galloway*, 102 Tenn. 415, 52 S. W. 859.

⁶⁶ *The D. R. Martin*, 11 Blatch. 233 (U. S.)

⁶⁷ *Markham v. Brown*, 8 N. H. 523.

departing passenger, though not a passenger, is entitled to be admitted to the station; and he may even, in order to assist a passenger, demand admittance to a train.⁶⁸

26. Peculiar rights of occupiers.—In several of the public services the obligation is limited to the supplying of the occupiers of premises. Such is obviously the case in regard to the water companies, the gas companies, the electric companies and the telephone companies which undertake to distribute their product or perform their services generally throughout the city. They do not undertake to serve every person as such, for it is obvious that their services are necessary only in connection with the use of buildings. Their obligation is, therefore, properly held to be limited to the occupiers of premises by the general character of their customary undertaking. As a Vice-Chancellor in New Jersey⁶⁹ said, it would be quite absurd to say that a person destitute of any local habitation within the corporate limits of Jersey City has the least right to demand a supply of gas. According to this analysis of the situation the occupiers of every house within the territory served have a right to be supplied. The Montana⁷⁰ case is therefore sound which holds that a rule of the company to the effect that it would only deal with owners, ignored the fundamental rights of tenants to have the service.

⁶⁸ McKone v. Michigan Central R. R., 51 Mich. 601, 17 N. W. 74.

⁶⁹ Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482.

⁷⁰ State ex rel. Milstead v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, LEADING ILLUSTRATIVE CASES.

Making occupancy the test gives rise to some nice problems as to the supply to apartment houses⁷¹ or to buildings with common ownership.⁷² If there are separate holdings there should be separate supply; there is no obligation to supply such unattached persons as mere boarders.

27. Obligations toward dependent services.— A special problem under the general head of the true extent of public duty is whether in dealing with dependent services those who conduct the principal service may make such arrangements as they please with those who apply for such special privileges, or whether there is a public duty in the premises requiring that equal facilities shall be granted. The railroad company surely owes no duty to expressmen themselves, as is shown by the fact that the railroad may do all the express business on the line itself. On the other hand, passengers coming in their own carriages could not be refused entrance to a station; and hacks ordered to meet passengers may come in and await them. Even when it is once established that there is a public duty toward their own patrons in respect to the subsidiary service involved, there remains the conflict of authority as to the extent to which this duty goes. According to the conservative view, the principal company fulfills its duty by making proper provision for the service desired. Thus a railroad by many courts is allowed to make an exclusive contract with one hack concern to use the station

⁷¹ *Ferguson v. Metropolitan Gas Light Co.*, 37 How. Pr. 189 (N. Y.).

⁷² *United States v. American Water Works Co.*, 37 Fed. 747.

grounds.⁷³ According to the progressive view, the whole law of public service applies to the situation and any discrimination between hackmen is therefore condemned.⁷⁴ An exclusive contract with one express company for the use of passenger trains is held in many jurisdictions legal as a sufficient provision for express service.⁷⁵ But in the radical courts such arrangements are condemned as fostering a monopoly which will inevitably exploit the public affected.⁷⁶

28. Furnishing of incidental services.—The real truth of this difficult matter seems to be that while public duty is involved in regard to some dependent services to such an extent that the whole law of public service should apply, there are other incidental services as to which there is no public obligation to prevent the making of such exclusive arrangements. It seems that equal access to railroad wharves should be given to competing steamboat lines; but the decisions as to that are conflicting.⁷⁷ Perhaps the private car business ought not to be turned over to favored concerns without competition, as it is under the favoring auspices of the conservative courts.⁷⁸ To be sure there seems to be

⁷³ *New York, New Haven & H. R. R. Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246.

⁷⁴ *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, LEADING ILLUSTRATIVE CASES.

⁷⁵ *The Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, LEADING ILLUSTRATIVE CASES.

⁷⁶ *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430.

⁷⁷ *See Louisville & N. R. R. v. West Coast Naval Stores Co.*, 198 U. S. 483, 25 Sup. Ct. 745.

⁷⁸ *Chicago St. L. & N. O. R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490.

no objection to giving exclusive privileges for boot-blacks in hotels.⁷⁹ But an inn must admit competing telephone companies to equal privileges.⁸⁰ The difference between these two classes of cases is obvious enough. There is a public necessity subserved in one class, while in the other class there is no real need at all. Even in the case of services which are public, there are some matters which are not obligatory. A railroad need not permit all baggage men to go upon the trains to solicit business before the station is reached. An express company cannot demand a booth in a terminal station, even if competitors have one.

29. Rights of connecting services.—The problem of connecting services cannot be dismissed by saying that for a carrier to make arrangements for interchange of business with one connection while refusing to do the same with another is illegal discrimination, for this is true only to the extent that public duty is involved. A railroad may not refuse altogether to have dealings with its connections—to accept goods from them or to deliver goods to them. Obviously this will not do; it is the duty of the railroad as a common carrier to accept and deliver goods at every station on its route for all patrons alike.⁸¹ The patron may himself decide by what successive parties he wishes the service performed, and from these directions the carriers de-

⁷⁹ *State v. Steele*, 106 N. C. 766, 11 S. E. 478.

⁸⁰ *Central N. Y. Tel. & Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 211.

⁸¹ A contract by a carrier not to receive goods destined beyond its own line is void. *Seasongood v. Tennessee & O. Transp. Co.*, 21 Ky. Law Rep. 1142, 54 S. W. 193, *LEADING ILLUSTRATIVE CASES*.

viate at their peril. Thereupon the law necessarily throws upon each carrier in turn the duty of tendering the goods for further transportation to the succeeding carrier; and normally, until it effectuates such delivery, the original carrier remains liable as a common carrier.⁸² The traditional rule at common law has been that there is no obligation to permit physical connections between railroads.⁸³ But if there is a sufficient amount of business that would usually be tendered at a junction should a station be opened, according to the more advanced views now held there ought to be a joint station established.⁸⁴

✓30. **Arrangements for through service.**—At common law one public service could not be compelled to enter into arrangements with another for continuous service as a single unit for a single rate. Through arrangements were left altogether to such private agreements as the parties should negotiate.⁸⁵ So far as the common law was concerned either through service was undertaken voluntarily by the initial carrier solely, as the English cases presumed it was when nothing was said to the contrary, or it was a case of successive carriage where each carrier was liable in turn, as the American cases generally presume in the absence of evidence.⁸⁶ It was

⁸² See *Western Union Telegraph Co. v. Simmons*, 93 S. W. 686 (Tex. Civ. App.), applying the same law to telegraph companies.

⁸³ *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Ry. Co.*, 110 U. S. 667, 4 Sup. Ct. 185.

⁸⁴ *Concord & M. R. R. Co. v. Boston & Maine R. R. Co.*, 67 N. H. 464, 41 Atl. 263, LEADING ILLUSTRATIVE CASES.

⁸⁵ *Southern Ind. Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022.

⁸⁶ This point is discussed fully in *Nutting v. Connecticut River R. R.*, 1 Gray 502 (Mass.).

possible for two carriers to establish through routes at joint rates; but there was no compulsion about it. It followed that a carrier could do as it pleased without being open to the charge of discrimination for choosing a certain carrier to be associated with it in through service under a joint rate with it.⁸⁷ But by the modern statutes, the regulating commissions are given power to establish joint rates and even to dictate as to the division thereof,⁸⁸ all of which is held constitutional on the ground of public interest in through service.

⁸⁷ *Southern Pacific Ry. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330, LEADING ILLUSTRATIVE CASES.

⁸⁸ *Interstate Commerce Commission v. Northern Pacific Ry.*, 216 U. S. 538, 30 Sup. Ct. 415.

CHAPTER IV.

CONDITIONS PRECEDENT.

31. **Performance of conditions prerequisite.**—It will be found, moreover, that there are many conditions precedent to the obligation of any particular public service company to serve any particular applicant. There is no obligation to render service to a particular applicant until he has put himself in a proper position to demand that service. It is the law again which determines under what conditions the service company may properly be held to respond to an application. In most services the law has made it plain what conditions there are as to time and place, method and manner. All these conditions must be performed by the particular applicant, though he be of the class to which the duty pertains, before a present duty is owed him, even though he wishes a service in respect to which there has been public profession of a general sort. Undoubtedly the most noteworthy example of these conditions which must be performed is the necessity of an offer of prepayment before any service will be due. Stated technically, the company rendering the service is therefore not in default until performance of the conditions precedent has been tendered. What conditions are thus insisted upon depend upon how the law has thought proper to safeguard all concerned.

32. Service asked at proper time.—The rule of the early cases was that a carrier could not be compelled to receive goods until it was ready to set out, even if it happened that it had storage facilities. In modern times, however, it is usually held necessary for the railroads, at least, to provide facilities for receiving goods in advance of the departure of their freight trains.⁸⁹ This obligation to receive goods in advance is only for a reasonable period; it still remains true that the carrier is not a warehouseman by profession. To state a close point, there are conflicting decisions as to whether an express company may enforce a rule that money will not be received on any day after the departure of the trains carrying express matter, the question being whether the company need be prepared to protect currency in the local office over night.⁹⁰ On the other hand, the carrier by rail may require that freight be delivered to it at a time sufficiently prior to the departure of its trains to enable it to make preparations for shipments.⁹¹ No person desiring to become a passenger upon a train may rightfully demand a delay of one minute to enable him to reach the train and get on board.⁹² It is of course very common to find in the conduct of a public service time-tables made which will govern the course of the service; and in public employments generally office hours are established to which public service

⁸⁹ *St. Louis I. M. & So. Ry. Co. v. State*, 84 Ark. 150.

⁹⁰ *Alsop v. Southern Exp. Co.*, 104 N. C. 278, 10 S. E. 297.

⁹¹ *Frazier & Cooper v. Kansas City, St. J. & C. B. R. R.*, 48 Ia. 571, *LEADING ILLUSTRATIVE CASES*.

⁹² *Pickett v. Southern Ry. Co.*, 69 S. C. 445, 48 S. E. 466.

is limited. In all dealings with public service companies, these time-tables govern and these office hours must be observed, provided they are just and reasonable, and give the community a sufficient service for the business which it provides.

33. Service demanded at proper place.—A carrier is not liable for refusing to take goods unless they have been actually tendered, or at least unless they are in the process of being tendered.⁹³ Usually the place which the carrier has designated in the particular instance must be resorted to, as where a carrier gave orders that coal should only be received at a certain siding.⁹⁴ It should be added that as the carrier may make regulations with regard to its performance of its obligations, it may refuse to take goods except at the stations which it has established. Those who have goods in readiness for transportation must notify the carrier of their desire to have their goods transported before it will be in default for not taking them. It would be going to an extreme to hold, as some cases do, that a deposit in the regular place for receiving goods followed by notice to the carrier is enough to make the carrier responsible as such, without proof of a special custom to that effect. In the case of passenger carriers, however, it is not uncommon to provide for the giving of a signal by the intending passenger.⁹⁵ As street railways are usually operated they owe a duty to the public to stop at

⁹³ *Little Rock & F. S. Ry. Co. v. Conatser*, 61 Ark. 560, 33 S. W. 1057.

⁹⁴ *Georgia Southern Ry. Co. v. Marshman*, 121 Ga. 235, *LEADING ILLUSTRATIVE CASES*.

⁹⁵ *Southern Ry. Co. v. Wallis*, 133 Ga. 553, 66 S. E. 370.

their regular crossings on a seasonable signal, given in any intelligible way.⁹⁶

34. Application in proper form.—Before being obliged to install its service a supplying company may require the applicant to make a regular application in such form as the company may prescribe.⁹⁷ This will be required to be in writing almost invariably, so as to have certainty as to the requirements; and the application must be made with sufficient particularity.⁹⁸ The company may not, however, require the applicant to subscribe to unreasonable regulations, such as that there shall be access to the premises at all hours, nor to illegal stipulations, such as that the company shall not be liable for defects in the service.⁹⁹ It is not enough to tender a message to a telegraph company with a request for its transmission, although of course one must show this at least. One will be met by the usual requirement by telegraph companies that all messages tendered to them for transmission shall be in writing upon their own blanks, which are invariably provided for the purpose, unless this requirement has been customarily waived.¹

35. Service demanded in proper manner.—That a carrier may refuse to receive goods for carriage unless they are properly packed, is clear enough. Thus an express company need not receive furniture

⁹⁶ *Karr v. Milwaukee L. H. & T. Co.*, 132 Wis. 662, 113 N. W. 62.

⁹⁷ *Shiras v. Ewing*, 48 Kans. 170, 29 Pac. 320.

⁹⁸ *Bennett v. Eastchester Gas Light Co.*, 54 N. Y. App. Div. 74, 66 N. Y. Supp. 292.

⁹⁹ *Dittmar v. City of New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

¹ *Western Union Telegraph Co. v. Dozier*, 67 Miss. 238, 7 So. 325, LEADING ILLUSTRATIVE CASES.

not crated or money not sealed.² But the requirements of the carrier as to packing must be reasonable; it may not reject a package on this ground if it is in fact reasonably safe for shipment. In general the loading and unloading of goods are under the carrier's control, and it is responsible for any injury incident thereto.³ Primarily it is the carrier's business to load its vehicles. A railroad may not usually require a shipper to put his goods upon the cars himself.⁴ If the shipper assumes the responsibility of loading and unloading, the carrier is thereby relieved from liability for loss in that connection unless the improper loading should have been apparent to the carrier's servant from ordinary observation, when the carrier will be liable.⁵ There are special kinds of freight which require special tender. If one wants his coal carried in bulk, he should provide facilities for loading the cars himself. And in service at private switches the shipper may justly be compelled to accept the responsibility therefor.

36. Reasonable conditions may be imposed.—The general principle must be taken as established that the carrier is entitled to establish and promulgate reasonable rules and regulations governing the manner and form in which it will receive such articles of commerce as it is bound to carry, so that they may be handled with convenience; and it follows as a corollary to such authority that the car-

² *Cohn v. Platt*, 48 N. Y. Misc. 378, 98 N. Y. Supp. 535.

³ *Elgin J. & E. Ry. Co. v. Bates Machine Co.*, 200 Ill. 636, 66 N. E. 326.

⁴ *London & L. F. Ins. Co. v. Rome W. & O. R. R.*, 144 N. Y. 200.

⁵ *Miltimore v. Chicago & N. W. R. R.*, 37 Wis. 190.

rier has also the power to modify such rules from time to time, as it may deem expedient.⁶ On the other hand, improper conditions may not be imposed even by regulation, since a common carrier is under obligation to accept within reasonable limits all ordinary goods which may be tendered to it for carriage at reasonable times, for which it has accommodation; and the carrier may not generally discriminate between persons who tender freight and exclude a particular class of customers.⁷ In household service where individual installation is necessarily required, it is the obligation of a supplying company to bring the supply to the premises of the applicant.⁸ The company, therefore, must itself provide all the facilities requisite to the performance of its service, and any attempt to defeat this obligation by imposing conditions will fail.⁹

37. Prepayment a universal condition.—Of the right to demand payment before undertaking the service requested, there can be no doubt. The carrier of goods may in all cases insist upon the payment of its charges when the goods are tendered to it.¹⁰ Even if it is a connecting carrier to which the goods are brought by the initial carrier, with the idea that the consignee shall ultimately pay, it may insist. So the carrier of passengers may make it a condition of accepting a passenger for carriage

⁶ *Harp v. Choctaw O. & G. R. R. Co.*, 125 Fed. 445.

⁷ *United States ex rel. v. Oregon Ry. & Nav. Co.*, 159 Fed. 975.

⁸ *Franke v. Paducah Water Supply Co.*, 88 Ky. 467, 11 S. W. 432.

⁹ *Snell v. Clinton Electric Light, Heat & Power Co.*, 196 Ill. 626, 63 N. E. 1082, LEADING ILLUSTRATIVE CASES.

¹⁰ *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88.

that the fare be paid in advance, or that a ticket shall be purchased and presented.¹¹ By the same principles a telephone user must pay in advance the usual charge made for the regular period of billing prevailing, and a patron at a pay station must pay the charge for the connection as required.¹² So tender of charges must accompany a demand for water service, especially where tap service is asked which can be computed in advance.¹³ Without going into more details at present, the general rule may be repeated, that in all cases the service company may refuse to act until payment is forthcoming. It would be intolerable to compel one to render service without securing to him his right to collect his pay.

38. Waiver of prepayment possible.—This necessity of tender may be waived in practice; and it generally is unnecessary to lay down the money before one is asked. Thus if the inn is open and the traveler enters and makes his desire to become a guest known to the innkeeper, the latter must request a tender if he means to insist upon it as a condition of receiving a guest.¹⁴ But in no case may payment for service be demanded on credit as a right, no matter how common such a practice may have been. Even in a case of a telephone company which for years had given patrons a month's credit by the system upon which its bills were rendered,

¹¹ *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907, LEADING ILLUSTRATIVE CASES.

¹² *Ashley v. Rocky Mountain Bell Telephone Co.*, 25 Mont. 286, 64 Pac. 765.

¹³ *Robbins v. Bangor R. & E. Co.*, 100 Me. 496, 62 Atl. 136.

¹⁴ *Fell v. Knight*, 8 M. & W. 269, 10 L. J. Ex. 277 (Eng.), LEADING ILLUSTRATIVE CASES.

it was held that it might by a mere notice require a particular customer to pay in advance.¹⁵ Where the waiver is plain in a particular case the full responsibilities of the undertaking will be held to have been begun without the performance of the condition. Thus where a carrier accepts goods for carriage without making demand for payment, it is liable as common carrier though the freight has not been paid.¹⁶ So if a telegram is taken with the understanding that the basis is that charges shall be collected from the sendee, the company is bound to forward it with all dispatch.¹⁷

39. The unit of service.—As a matter of convenience public service is usually offered in fixed units. The decision of the company as to the units in which it will provide service is conclusive unless its action is unreasonable. One who wishes to go a journey may not demand the right to pay mile by mile; but the company may insist that he pay for the whole journey as a unit.¹⁸ And one who wishes water for irrigation may not demand a day's supply; on the contrary it may be insisted that he shall take for the whole season.¹⁹ In these two instances the unit insisted upon by the company is the natural unit of service; but there are many instances in public service where there is no natural unit, and in such cases the matter must be left to the decision of the company unless it acts outrageously. Thus

¹⁵ *Malochee v. Gt. So. Tel. & Tel. Co.*, 49 La. Ann. 1690, 22 So. 922.

¹⁶ *Porter v. Raleigh & G. R. Co.*, 132 N. C. 71, 43 S. E. 547.

¹⁷ *Western Union Telegraph Co. v. Cunningham*, 99 Ala. 314, 14 So. 579.

¹⁸ *London & N. W. B. R. v. Hinchcliffe*, (1903) 2 K. B. 32 (Eng.).

¹⁹ *Wheeler v. No. Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. 487.

it would be entirely reasonable for the company to fix three months as the unit of water service.²⁰ And a telephone company may fix a year for the initial service at the time of installation.²¹ Considered as an existing fact, the unit established is an entirety; payment of the whole unit must be tendered in order to be in a position to demand any service. And the fare for the whole journey must be paid whenever demand is made.

40. **Payment of arrearages demanded.**—It would seem that the applicant is entitled to present service upon payment for the present unit, regardless of whether he owes for past services. And it would seem to follow that to refuse future service when present payment is offered therefor until arrears shall be paid, is, for a public service company, illegal. But as to the legality of such a policy in the management of a public employment, there is a surprising conflict of authority. On one hand are the decisions which hold that in refusing to serve those who come with ready payment, the company in question acts contrary to its public duty, which is to serve without discrimination all that apply.²² But there are other cases equally insistent in holding that, if the present applicant owes for a supply given him, he is in no position to demand a further supply, even if ready money is tendered for it.²³

²⁰ *Harbison v. Knoxville Water Co.*, 53 S. W. 993 (Tenn. Ch. App.), **LEADING ILLUSTRATIVE CASES.**

²¹ *Buffalo County Telephone Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064.

²² *Crow v. San Joaquin & K. R. C. & I. Co.*, 130 Cal. 309, 62 Pac. 562.

²³ *People v. Manhattan Gas Light Co.*, 45 Barb. 136 (N. Y.), **LEADING ILLUSTRATIVE CASES.**

Although this is clearly in the face of public duty, much is made in these cases of the argument of the convenience to the company in making its collections. It is agreed, however, that an applicant need not settle the unpaid bills of the previous tenant of the premises.²⁴ Nor may disputed claims be enforced by refusing further service until settlement is made.²⁵

²⁴ *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874.

²⁵ *Mansfield v. Humphreys Mfg. Co.*, 82 Oh. St. 216, 92 N. E. 233.

PART II

CONDUCT OF PUBLIC SERVICE

CHAPTER V.

COMMENCEMENT OF THE SERVICE.

41. **When service is begun.**—The question is often raised whether in a particular case the regular relationship of the public sort has actually been established by the undertaking of the service asked. The modern railroad habitually receives passengers at stations, and so is liable from the time the traveler comes upon the premises. On the other hand, it does not commonly undertake to be liable for goods until some employee takes them in charge. The further question then arises, whether the transaction under examination is upon a public or a private basis. Suppose that one engaged in a public employment makes a special arrangement with one whom he would have been obliged to serve—is this service upon a public or private basis? Or suppose not being obliged to serve the particular applicant he actually receives him as though he were—is this service upon a public or private basis? These distinctions are shown plainly in the law of innkeeping. Although obliged to receive a traveler as a guest, the innkeeper may, by special arrangement

with him, receive him as a boarder. On the other hand, although not obliged to receive a neighbor as a guest, an innkeeper may voluntarily receive him as such, which would usually be shown by the signing of the register.

42. Acceptance as common carrier.—The peculiar responsibilities of the carrier of goods do not begin until the moment when it assumes possession. But its liability as such begins at once on the receipt of goods for transportation, though the goods have not yet been started toward their destination. That is, the liability of the carrier as such depends upon its possession, with the right to transport immediately.²⁶ But when goods are received by the carrier, not for immediate transportation but to be held pending orders of the shipper, the carrier holds the goods as a warehouseman only.²⁷ And where goods are offered to a railroad company at an unreasonably long time before the train starts, if the carrier actually takes the goods it becomes responsible at once as a carrier, although the carrier might have refused to take them so long in advance and the shipper knows that according to the time-table the goods will not be carried until a later time.²⁸ But where upon the special understanding that for the shipper's own convenience the carrier had received goods into its warehouse before the opening of navigation, to be forwarded as soon as possible thereafter, it was

²⁶ *Shaw v. Northern Pacific R. R.*, 40 Minn. 144, **LEADING ILLUSTRATIVE CASES.**

²⁷ *Barron v. Eldredge*, 100 Mass. 455.

²⁸ *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281.

not held liable as a carrier while the goods were in the warehouse.²⁹

43. Delivery to the carrier.—The delivery to the carrier of goods or property for shipment may be actual or constructive, but there must be a delivery and acceptance of the goods. Thus delivery to the driver of an express wagon collecting goods is a good delivery to the company, as the goods have actually been received in due course of business.³⁰ On the other hand, the deposit of goods beside a railroad track, as upon a platform provided to receive them, though they are so deposited for immediate shipment ready to be loaded upon the freight train when it arrives, is not, in the absence of special custom, delivery which renders the carrier liable.³¹ Where goods are taken out of the vehicle in which they are brought to the conveyance of the carrier, the tackling by which the transfer is effected usually belongs to, or at least is operated by, the carrier; and in that case the carrier's responsibility begins as soon as the goods are attached to the tackling;³² and similarly where grain or liquid is shipped in bulk, being delivered through a chute, the cases hold that when the carrier has control of the mouth of the pipe it is responsible for the grain spilled.³³

44. Acceptance as a passenger.—Likewise the relation of carrier and passenger may arise before

²⁹ *Ham v. McPherson*, 6 Upp. Can. Q. B. (N. S.) 360.

³⁰ *Southern Exp. Co. v. Newby*, 36 Ga. 635.

³¹ *Grosvenor v. New York Central R. R.*, 39 N. Y. 34, LEADING ILLUSTRATIVE CASES.

³² *Merritt v. Old Colony & N. Ry. Co.*, 11 Allen 80 (Mass.).

³³ *The R. G. Winslow*, 4 Biss. 13 (U. S. Cir. Ct.).

actual transportation has begun. If there has been consent manifested to receive one as passenger, whether this be express or implied, it is enough. Thus if a person who intends to be carried has boarded a vehicle which has been put at his disposal, he has become a passenger, though the vehicle has not yet started.⁸⁴ And one who is in the waiting room of a station ready to board the cars has been held already to be entitled to all the rights of a passenger.⁸⁵ It was early held that when a man, intending to take passage in a vehicle which has stopped to receive him, puts his foot upon the step or his hand upon a hand rail, he has been accepted as a passenger, and the responsibility of the carrier toward him as a passenger has begun.⁸⁶ In accordance with this reasoning, it has been held in most cases relating to street cars that the relation of carrier and passenger is established the moment the vehicle slackens its speed in response to signal.⁸⁷

45. Basis of the undertaking.—Where the customer is dealing with an employee, it is sometimes difficult to say whether the servant is undertaking public service on behalf of his master, or whether he is agreeing to a private service in his personal capacity. Where a parcel was given to the coachman who undertook to deliver it in town, it was held that such carriage was a private matter, undertaken by the servant personally.⁸⁸ A person leaving

⁸⁴ *Massiter v. Cooper*, 4 Esp. 260 (Eng.).

⁸⁵ *Norfolk & W. R. R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

⁸⁶ *Brien v. Bennett*, 8 C. & P. 724 (Eng.), *LEADING ILLUSTRATIVE CASES*.

⁸⁷ *St. Louis I. M. & S. Ry Co. v. Lawrence*, 153 S. W. 799 (Ark.).

⁸⁸ *Butler v. Basing*, 2 C. & P. 613 (Eng.).

a package upon the front platform of a street car should not expect the company to be liable, unless there has been a holding out to take for an additional price miscellaneous parcels which passengers bring with them.³⁹ When the telegraph operator writes out the message as a favor to the sender, he is acting plainly for him, not for the company.⁴⁰ One who is received as a guest upon the invitation of the servant of the proprietor certainly should understand that he does not fall within the profession of that master. Thus one riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant without paying fare, should never be held to be a passenger, his relations being with the servant, not with the carrier.⁴¹

46. **Whether relationship is established.**—To be received at an inn as a guest one must make himself known to the innkeeper, and request entertainment.⁴² Moreover, he must be accepted by the innkeeper, or be given cause to understand that he has been.⁴³ A passenger must put himself in the care of the carrier, and there must be something from which it may fairly be implied that the company has accepted him as a passenger. So a traveler who is concealing himself with the intention of stealing a ride, clearly is not a passenger.⁴⁴ One who

³⁹ *Levi v. Lynn & B. Ry. Co.*, 11 Allen 300 (Mass.).

⁴⁰ *Pegram v. Western Union Telegraph Co.*, 100 N. C. 28, 6 S. E. 770.

⁴¹ *Toledo W. & W. Ry. Co. v. Brooks*, 81 Ill. 245, LEADING ILLUSTRATIVE CASES.

⁴² *Bernard v. Lalond*, 8 Leg. News 215 (Can.).

⁴³ *Brewer v. Caswell*, 132 Ga. 563, 64 S. E. 674.

⁴⁴ *Muehlhausen v. St. Louis R. R.*, 91 Mo. 332, 2 S. W. 315.

obtains service by fraudulent representations in obtaining his ticket cannot claim the rights of a passenger.⁴⁵ And one who makes a deal with a conductor to let him travel for a gratuity paid must know that he is entering into no relations with the company.⁴⁶ Nor can one who conceals the true nature of goods shipped in order to get a lower rate charge the carrier with their loss.⁴⁷ The fundamental principle in all of these cases is that there is no assent by the company to enter into the relationship. Or if there is apparent consent, it is obtained by the fraud used to gain it.

47. Service under unusual conditions.—A railroad is not a common carrier of a person who by permission of the engineer rides on a locomotive.⁴⁸ And so a passenger who, without the knowledge or consent of the conductor of the train, rides in the baggage car, cannot maintain an action against the railroad company for injuries sustained which would not have happened to him had he been in a passenger car.⁴⁹ So clearly, one riding upon a construction train of flat cars before general service is begun must appreciate that he is not being accepted as a passenger by the company.⁵⁰ Yet the possibility remains that one may be accepted upon a freight train as a passenger, if the circumstances are such as give him to understand that this is a regular

⁴⁵ *Mendenhall v. Atchison T. & S. F. Ry. Co.*, 66 Kans. 438, 71 Pac. 846.

⁴⁶ *Grahn v. International & G. N. R. R. Co.*, 100 Tex. 27, 93 S. W. 104.

⁴⁷ *Oppenheimer & Co. v. United States Express Co.*, 69 Ill. 62.

⁴⁸ *Ramm v. Minneapolis & St. L. R. R.*, 94 Iowa 296, 62 N. W. 751.

⁴⁹ *Bricker v. Philadelphia & R. R. R.*, 132 Pa. St. 1, 18 Atl. 983.

⁵⁰ *Wade v. Lutcher & Moore Cypress Lumber Co.*, 74 Fed. 517.

course of business.⁵¹ But if no such custom of taking passengers on freight trains prevails, one could hardly reasonably consider himself accepted by the company as a passenger, whatever his dealing with the conductor may be.⁵² And the circumstances could hardly arise under which one might think of himself as a regular passenger while riding on a hand car.⁵³

48. Special arrangements for particular service.—If the owner of goods goes along with them and retains possession of them, the person who furnishes the vehicle is not a carrier since he is not a bailee. In the case of a ferry, for example, the fact that the owner goes along with the goods and often retains the entire charge and management of them (as for instance where he drives a horse on the ferryboat and manages him while on the boat), prevents the relation of carriage.⁵⁴ But though the owner of cattle or his servant may accompany the cattle, as a driver, while they are being carried, and may care for them and help unload them, the railroad company is none the less the bailee and carrier of the cattle, as he must do all this while the cattle are in the possession of the railroad company and at such times as it chooses to select for the purpose.⁵⁵ The case of the circus train is peculiar in that the keeping of the wild beasts obviously re-

⁵¹ *Illinois Central R. R. v. Davenport*, 177 Ill. 110, 52 N. E. 266.

⁵² *Eaton v. Delaware L. & W. R. R. Co.*, 57 N. Y. 382, *LEADING ILLUSTRATIVE CASES*.

⁵³ *Cleveland v. Pine Bluff Arkansas Ry.*, 154 S. W. 191 (Ark.).

⁵⁴ *White v. Winnisimmet Co.*, 7 Cush. 155 (Mass.).

⁵⁵ *Southern Ry. Co. v. Webb*, 143 Ala. 304, 39 So. 262.

mains with the owners of the circus who make a special contract for the haulage of their train.⁵⁶ In much the same way, when vessels are towed the towboat owner is rarely held to take possession from the shipowners.⁵⁷

⁵⁶ *Coup v. Wabash, St. L. & P. Ry. Co.*, 56 Mich. 111, LEADING ILLUSTRATIVE CASES.

⁵⁷ *Alexander v. Greene*, 3 Hill 9 (N. Y.).

CHAPTER VI.

REGULATION OF THE EMPLOYMENT.

49. **The place of regulations.**—Public businesses are usually carried on upon a large scale, and for their proper conduct it is plainly requisite to have established regulations. Great scope is allowed to regulations by the law, large discretion being given to those who are confronted with the problem of reducing to order a complicated business. However, it is the law, here as elsewhere, which has the last word to say concerning the propriety of the regulation in question. What the courts generally do is to hold justifiable a regulation which is made by a company in good faith and enforced by it without discrimination, unless it is plainly outrageous in its general operation. If the court might have itself done differently, or even if it sees hardship in particular cases, neither of these things is enough, as will be seen, to induce it to set the regulation aside, or hold it no justification for what was done in pursuance of it. Without regulations, a company may refuse to accede to particular requests, but it must then show that the particular request is unreasonable. But with a general regulation, a service may be refused to anyone, notwithstanding his particular hardship, unless the whole rule is shown to be unreasonable or inconsistent with the duty which the company owes to the public.

50. **Scope of regulations limited.**—Regulations which are in promotion of public service are valid, while regulations which are inconsistent with public duty are void. One branch of this rule was expounded in one of the earliest American cases in dealing with the somewhat complicated regulations of a canal company as to the order of passage of boats at docks.⁵⁸ “The defendants, as owners, had the right to prescribe such reasonable rules and regulations for the government of vessels passing along their canal, as their directors deemed best calculated to promote their own interest and the interests of those engaged in navigating the canal.” But this is subject to the qualifications stated in another early case, holding that negroes could be assigned to separate quarters although not excluded from the conveyance.⁵⁹ “The right to be carried is a right superior to the rules and regulations of the boat, and cannot be affected by them.” It must be remembered that under our system of private ownership questions of management must be solved in the first instance by the owners themselves. We should not let regulation by the state become virtually operation.

51. **Proper establishment of regulations.**—Generally speaking, regulations are not binding unless there has been due notification of them. This does not mean that in every individual case they must have been brought home to the person who is held to be governed by them; it simply means there must

⁵⁸ *Pennsylvania Coal Co. v. Delaware & H. Canal Co.*, 31 N. Y. 91.

⁵⁹ *Day v. Owen*, 5 Mich. 520.

be such publication of them as should fairly affect the patrons concerned with knowledge of them.⁶⁰ Publication may be by notices posted upon the premises, by provisions printed upon tickets, by advertisements or handbills or in any other way that promises sufficient publicity.⁶¹ When regulations are changed there must be due notice, the same rules applying as in the publication of the original regulations.⁶² Even a provision in the original regulation that there may be change without notice, should be unavailing.⁶³ Waiver of regulations to be effectual must be made by an official having at least apparent authority in the premises. A conductor could not bind the company by promising to stop a train in defiance of a published time-table.⁶⁴ Implied waiver comes about by acquiescence in their constant violation by officers charged with the enforcement of rules. Thus when a street railway habitually permits passengers to ride upon platforms, although it has a rule to the contrary, its regulation is held to have been waived.⁶⁵

52. Reasonable enforcement of regulations.—The power to make regulations carries with it the power to enforce them. The carrier may expel those who refuse to conform to its reasonable regulations.⁶⁶ But such ejection must be accomplished at a proper time and place, and in a proper method

⁶⁰ Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992.

⁶¹ Van Dusen v. Grand Trunk Ry. Co., 97 Mich. 439, 56 N. W. 848.

⁶² Sears v. Eastern R. R. Co., 14 Allen 433 (Mass.).

⁶³ Geer v. Michigan Central Ry. Co., 142 Mich. 511, 106 N. W. 72.

⁶⁴ White v. Evansville & T. H. R. R., 133 Ind. 480, 33 N. E. 273.

⁶⁵ United Ry. & El. Co. v. Hertel, 97 Md. 382, 55 Atl. 428.

⁶⁶ Decker v. Atchison T. & S. F. Ry. Co., 3 Okla. 553, 41 Pac. 610.

and manner.⁶⁷ However, this power to enforce regulations does not go to the extent of permitting the company arbitrarily to impose a pecuniary penalty for breaking the rules.⁶⁸ Nor can the company hold a passenger until the fare is forthcoming, without being liable for false imprisonment.⁶⁹ Similar principles justify a supplying company or a service in cutting off service for default or disobedience of reasonable rules. And like limitations upon this power are to be found if it is exercised with outrageous disregard of the rights of the patron, as in the case where the claim is in dispute or where there has been failure to give notice.

53. Conditions upon acceptance.—Regulations relating to the conditions under which service will be undertaken are to be tested by the general conditions pertaining to the service. Thus a railroad may refuse to take goods or passengers unless they are tendered or present themselves within a reasonable time before the scheduled departure of its trains.⁷⁰ And so freight or passengers may be refused if the tender is not made or the demand is not made at its regular stations.⁷¹ Moreover, the railroad may by reasonable regulations require that certain freight shall be tendered to it at a particular place or in a certain manner.⁷² So an express company may require that valuables

⁶⁷ *Hudson v. Lynn & B. Ry. Co.*, 178 Mass. 64, 59 N. E. 647.

⁶⁸ *American Water Works Co. v. State*, 46 Neb. 194, 64 N. W. 711.

⁶⁹ *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77.

⁷⁰ *Frazier & Cooper v. Kansas City, St. J. & C. B. Ry. Co.*, 48 Iowa 571,
LEADING ILLUSTRATIVE CASES.

⁷¹ *Nashville St. Ry. Co. v. Griffin*, 104 Tenn. 81, 57 S. W. 153.

⁷² *Robinson v. Baltimore & O. R. R. Co.*, 129 Fed. 753.

shall be sealed in certain ways at the time of delivery to the carrier.⁷³ But if goods are actually taken, notwithstanding the fact that they could have been refused because not tendered in accordance with the regulation, the carrier becomes fully responsible for them as for any other goods which have been taken in charge.

54. Times established for service.—Time-tables are to be justified thus, and transportation need only be given according to an established schedule. A time-table which provides a service sufficiently frequent to handle the whole business offered, is a justification for not giving individual attention to particular cases.⁷⁴ Time-tables should be established with due regard to the real needs of the community, more frequent service being demanded where there is much travel than where there is little. Moreover, train movements should be so arranged as to take care of the business properly. A railroad is not absolutely responsible for adherence to schedule; it is excused if its failure is due to causes for which it is not to blame.⁷⁵ In many public businesses there are premises maintained for the use of the public in the course of the service, or offices established for the convenience of the public dealing with the company. A railroad may certainly by proper regulation close its stations for certain periods; it is usually enough if they are opened a reasonable time before and after the departure of

⁷³ *St. John v. Southern Express Co.*, 1 Woods 612 (U. S.): See also *Platt v. Lecoq*, 158 Fed. 723, LEADING ILLUSTRATIVE CASES.

⁷⁴ *Riley v. Wrightsville & T. R. R. Co.*, 133 Ga. 413, 65 S. E. 890.

⁷⁵ *Gordon v. Manchester & L. Ry. Co.*, 52 N. H. 596.

trains.⁷⁶ But if a telegraph office is actually open, although it is after usual closing time, a message must be received. The case is not different from that of a train behind its schedule and stopping at a station. In both cases service must be rendered.⁷⁷

55. Limitations upon supplying services.—Like-wise supplying companies may make regulations to prevent abuse of the supply by waste, or by fraud upon them by diverting the supply.⁷⁸ But a regulation providing that the agents of the gas company should have free access to the premises at all hours for examining appliances was held to be outrageous.⁷⁹ It has been held that the supply of a customer might be cut off for letting the water run, although he offered to prove that it was necessary to do this in order to get the water fresh.⁸⁰ So a regulation was held justified which provided that, during the sprinkling season, all outside hydrants of a water taker which were a part of his piping system must have the threads filed from them, if he would not pay for sprinkling service.⁸¹ A telephone company may properly object to any tampering by its patrons with the instruments they provide, as that would tend to defeat the service.⁸² But regulations unconditionally forbidding gas users to have gov-

⁷⁶ *Phillips v. Southern Ry. Co.*, 124 N. C. 123, 32 S. E. 388, LEADING ILLUSTRATIVE CASES.

⁷⁷ *Bright v. Western Union Telegraph Co.*, 132 N. C. 317, 43 S. E. 841.

⁷⁸ *Ferguson v. Metropolitan Gaslight Co.*, 37 How. Pr. 189 (N. Y.).

⁷⁹ *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539.

⁸⁰ *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060.

⁸¹ *Harbison v. Knoxville Water Co.*, 53 S. W. 993 (Tenn.), LEADING ILLUSTRATIVE CASES.

⁸² *Gardner v. Providence Telephone Co.*, 23 R. I. 312, 50 Atl. 1014, LEADING ILLUSTRATIVE CASES.

ernors incorporated in their own piping system have been held to be unreasonable.⁸³

56. Regulations relating to prepayment.—Among the first regulations with which a patron is met are those which are designed to secure prepayment. Thus a street car company may require that a passenger shall deposit his fare in cash in a box upon entering the car.⁸⁴ Indeed, the regulations may go further, as they do upon some elevated railways, and require that the passengers first procure a ticket to present at the gate.⁸⁵ One of the most illuminating illustrations of the operation of a regulation in changing the situation between the company and its patron is that while a street car company must apparently accept a five dollar bill tendered for its small fare,⁸⁶ yet a regulation that no larger bill than two dollars will be changed is held reasonable.⁸⁷ In the supply services the company may require a deposit as security if the amount of the deposit required is not far from what a current bill would be.⁸⁸ And of the validity of a rule that telephone subscribers must pay before a certain day after bills have been rendered, on pain of having their services cut off, there can be no doubt.⁸⁹

57. Systems to prevent escaping payment.—In order to make sure that none are obtaining service

⁸³ Consolidated Gas. Co. v. Blondell, 89 Md. 732, 43 Atl. 817.

⁸⁴ Nye v. Marysville & Y. C. St. Ry. Co., 97 Cal. 461, 32 Pac. 530.

⁸⁵ Corwin v. Long Is. Ry. Co., 2 N. Y. City Ct. 106.

⁸⁶ Barrett v. Market St. Ry., 81 Cal. 296.

⁸⁷ Funderburg v. Augusta & A. Ry. Co., 81 S. C. 141, 61 S. E. 1075, LEADING ILLUSTRATIVE CASES.

⁸⁸ Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236.

⁸⁹ Irvin v. Rustville Co-operative Telephone Co., 161 Ind. 524, 69 N. E. 258.

without payment, elaborate regulations are devised, concerning which there has been much litigation. Thus a railroad may require that passengers shall show their tickets before passing the gates leading to the trains,⁹⁰ and that these tickets shall be produced upon request of the conductor taking up fares.⁹¹ Similarly street car companies may require that a proper transfer be presented upon changing cars⁹² and that transfers shall be good only at intersecting points.⁹³ If a person has bought a ticket, and even after having once presented it loses it, he may be expelled from the train when the time comes for showing his ticket again.⁹⁴ The passenger is, however, entitled to a reasonable opportunity to search for his ticket.⁹⁵ The real justification for these elaborate regulations is that they are well designed to enforce the ticket system, without which orderly management would be impossible.

58. **Excess charge for cash fare.**—As the railroad company may require tickets absolutely, if it permits cash to be paid on the train in the alternative by those who have not procured tickets in advance, an extra charge may be made those who have not procured tickets.⁹⁶ Certainly the usual system of requiring a larger cash payment to the conductor accompanied with a refund check for the excess is

⁹⁰ *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907, LEADING ILLUSTRATIVE CASES.

⁹¹ *Ammons v. Southern Ry. Co.*, 138 N. C. 555, 51 S. E. 127.

⁹² *Birmingham Ry. L. & P. Co. v. McDonough*, 153 Ala. 122, 44 So. 960.

⁹³ *Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 78.

⁹⁴ *Harp v. Southern Ry.*, 119 Ga. 927, 47 S. E. 206.

⁹⁵ *Maples v. New York & N. H. R. R. Co.*, 38 Conn. 557.

⁹⁶ *Railroad Co. v. Skillman*, 39 Oh. St. 444.

permissible.⁹⁷ This regulation is not in itself unreasonable or needlessly inconvenient to the traveler, and its validity, upon general principles and on authority, would seem to be beyond question, since only by the ticket system can the company effectively protect itself from fraud of all sorts. A difficult situation, which has often come before the courts, is where the ticket office at the station where the passenger comes to take the train is wrongfully closed by neglect of the station agent. Under such circumstances, the great majority of the cases have held that, as the passenger has had no opportunity to obtain a ticket, he should not be ejected for refusal to pay the extra charge.⁹⁸ There are, however, cases to the contrary, holding that when a passenger presents himself without a ticket, the obvious duty of the conductor, so far as he is concerned, is to enforce the regulation requiring the payment of the excess cash fare, unless he knows for a fact that the office was closed.⁹⁹

59. Effect of agent's mistake.—Where the ticket agent gives a ticket not good for the transportation asked for, so that when this ticket is presented to the conductor the passenger cannot get the transportation which he expected, the company is in the wrong.¹ But where the intending passenger makes a mistake in asking for a ticket so that the wrong ticket is given him, or his acceptance of the wrong

⁹⁷ *State v. Goold*, 53 Me. 279.

⁹⁸ *Forsee v. Alabama Gt. So. Ry. Co.*, 63 Miss. 66, *LEADING ILLUSTRATIVE CASES*.

⁹⁹ *Monnier v. New York C. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569.

¹ *Jevons v. Union Pacific R. R. Co.*, 70 Kans. 491, 78 Pac. 817.

ticket is palpably negligent, he is foreclosed.² The abstract question whether the company or the passenger is in the wrong is usually decided properly without any noteworthy conflict of authority; but there is an irreconcilable division in the authorities as to the consequences of the company's being in the wrong. There are many states³ where it is held that if the company is in the wrong, the passenger may resist expulsion and recover damages for personal injuries caused thereby. But in fully as many other states⁴ it is held that although the ticket agent was in the wrong, so that the company may be sued for his default, the passenger has in fact gained no right to travel, and the conductor commits no wrong by ejecting him. The writer favors this latter view, because he believes in the inherent necessity of the ticket system. With this policy it is reasonable to enforce in this case, as in all others, the regulation that only those may expect to be passed by the conductor who present a good ticket. The company, however, remains liable for the original wrong done the passenger, when the ticket agent failed to pass out the proper ticket.

60. Mistakes of the conductors.—Where the first of two conductors wrongfully punches the ticket or collects the ticket without giving a check, so that the conductor upon another train either refuses return passage or further transportation, the same situation again arises, and the same conflict of author-

² *Rudy v. Rio Grande Western Ry. Co.*, 8 Utah 165, 30 Pac. 366.

³ *Mace v. Southern Ry. Co.*, 151 N. C. 404, 66 S. E. 342.

⁴ *Bradshaw v. So. Boston R. Co.*, 135 Mass. 407, **LEADING ILLUSTRATIVE CASES.**

ity results. Some cases⁵ hold that the second conductor expels such a passenger at his peril, on the ground that the ticket which he is presenting is the one which the previous conductor has assured him would be all right. Others hold,⁶ however, that the second conductor may eject the passenger, as he has not a proper ticket, and the passenger must seek his redress from the company for the wrong done him by the first conductor. It should be said that if the whole mistake is made by the conductor himself, the expulsion will be wrongful. Thus where a conductor collects a ticket and afterwards wrongfully expels a passenger, the conductor is responsible for the injury caused thereby.⁷ And where the passenger actually has a good ticket which the conductor—however honestly mistaken—refuses to honor, it would seem clear that the passenger may resist expulsion.⁸

⁵ *Philadelphia W. & B. R. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97, LEADING ILLUSTRATIVE CASES.

⁶ *Townsend v. New York C. & H. R. R. R. Co.*, 56 N. Y. 295.

⁷ *Arnold v. Rhode Island Co.*, 28 R. I. 118, 66 Atl. 60.

⁸ *Northern Central R. R. Co. v. O'Connor*, 76 Md. 207, 24 Atl. 449.

CHAPTER VII.

COURSE OF THE UNDERTAKING.

61. **Conduct of the undertaking.**—In the first place those who have undertaken a public service have always been strictly held to use every effort practicable to carry it through as promptly as may be. The duty is performed if all that could be asked of the proprietors has been done. There are, therefore, many unexpected obstacles which will excuse delay in performing services. But even if the delay is excused, the duty remains to complete performance, if that can be done. Indeed, quite extraordinary steps are often required by the law for the protection of the patron at all times. This duty to take affirmative steps to protect the interests confided to them is one of the obligations which differentiates public service from private employment. And, as will be seen, one extraordinary result of this affirmative obligation to furnish protection is that the proprietors are held absolutely liable for any attack which their own servants may make upon those in their charge. Moreover, by the general rule public servants are held strictly accountable for any departure from the service undertaken. What they have assumed to do for their patrons they must do in the very way that they have undertaken to do it. If they fail to perform in the way they have undertaken they are held absolutely liable for what hap-

pens. However, if extraordinary events occur after performance has been begun any necessary departure from the designated course will be excused. But, on the other hand, every effort must be made to minimize the loss involved.

62. Delay in performing service.—Sometimes the delay is so obvious as to speak for itself. Thus the consumption unexplained of thirty days in the carriage of goods usually taking but three days is certainly clearly negligent.⁹ But the carrier does not insure against delay in the delivery of goods. If he uses all reasonable effort to get them through that is all the law requires.¹⁰ What is reasonable time for performing transportation depends upon the mode of conveyance, the distance to be traversed, the nature of the goods, the season of the year, and the facilities available for transportation. The requirement of reasonable dispatch in forwarding goods does not necessarily require performance at the earliest possible moment, not by the next train certainly, nor even necessarily on the same day.¹¹ Even in the case of a telegram its delivery in its regular order and within an hour from the time it was received at the office in the city of delivery has been held to be with reasonable dispatch.¹²

63. Loss concurrent with delay.—Even if the delay is one for which the carrier is clearly to blame, it does not necessarily follow that there is liability for every loss in connection with it. Of course, the

⁹ *Illinois Central Ry. Co. v. Cobb, C. & Co.*, 64 Ill. 128.

¹⁰ *Delaney v. United States Express Co.*, 74 S. E. 512 (W. Va.).

¹¹ *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 586.

¹² *Julian v. Western Union Telegraph Co.*, 98 Ind. 327.

liability is plain when the loss is directly the result of the delay, as in that case¹³ where a carter, delayed in his journey, left his wagon in mid-river at a ford and the goods, as he might have foreseen, were injured by a freshet. And where the carrier transported potatoes unduly slowly in winter, the exposure to the risk of freezing in a subsequent period of severe cold was properly held to be so materially increased by the extension of the usual period of transit as to make the carrier liable.¹⁴ There is, however, a noteworthy conflict of authority upon the question whether a carrier who delivers goods to an intermediate point late should be held responsible for the destruction of the goods there by an act of God. Many hold that the negligent delay of the carrier in transportation should not be regarded as the real cause of the loss of goods by flood, even admitting that had the goods been transported with reasonable diligence they would not have been involved in the casualty.¹⁵ But the many cases must be reckoned with which hold that liability is made out from the mere fact that the loss would not have happened but for the negligent delay, some judges going so far as to say that if a carrier unjustifiably late is passing a powder magazine just as it is struck by lightning, the owner of the goods may sue for their destruction.¹⁶

¹³ *Campbell v. Morse*, Harper 468 (N. C.).

¹⁴ *Fox v. Boston & M. R. R. Co.*, 148 Mass. 220, 19 N. E. 222, *LEADING ILLUSTRATIVE CASES*.

¹⁵ *Denny v. New York Central R. R.*, 13 Gray 481 (Mass.).

¹⁶ *Green-Wheeler Shoe Co. v. Chicago R. I. & P. Ry. Co.*, 130 Iowa 123, 106 N. W. 498, *LEADING ILLUSTRATIVE CASES*.

64. Deviation from the undertaking.—The undertaking of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route. In accordance with this very general principle it has been held a deviation for a carrier, in violation of its undertaking, to ship goods before the time agreed upon¹⁷ or on a different vessel from that stipulated for.¹⁸ So it is deviation to ship by rail instead of by water,¹⁹ or by water instead of by rail.²⁰ It may be a deviation to forward by steamship instead of sailing vessel,²¹ and it is a deviation to transship goods.²² But it would probably be going too far to call it a deviation to carry the goods in a position different from the directions given, or to hold them for too long a time. But generally speaking any material departure in the conduct of carriage from the special undertaking in regard to it constitutes a deviation, as any course which differs materially from the performance which was understood to have been undertaken is a deviation.

65. Absolute liability during deviation.—Proof of a deviation and loss concurrent with it, from whatever cause arising, makes out a case of liability without more.²³ By the general theory this liability

¹⁷ *Campion v. Canadian Pacific Ry. Co.*, 43 Fed. 775.

¹⁸ *Green & B. R. Nav. Co. v. Marshall*, 48 Ind. 596.

¹⁹ *Merrick v. Webster*, 3 Mich. 268.

²⁰ *Philadelphia & R. R. Co. v. Beck*, 125 Pa. St. 620, 17 Atl. 505.

²¹ *Simkins v. Norwich & N. L. Steamboat Co.*, 11 Cush. 102 (Mass.).

²² *The Maggie Hammond*, 9 Wall. 435 (U. S.).

²³ See the language in *Davis v. Garrett*, 6 Bingham 716 (Eng.), and in *Church v. Chicago, M. & St. P. Ry. Co.*, 6 S. D. 235, 60 N. W. 854.

is not based upon negligence in the conduct of the undertaking, nor do the cases require proof of negligence. The mere fact of deviation is essentially a wrong in itself, as it constitutes a repudiation of the arrangement under which the carrier was authorized to act. The carrier, as the cases go, is unhesitatingly held liable in all cases, even when the act of God or the king's enemies are clearly the real cause of the loss. The explanation of this rule making the carrier who has deviated from its undertaking liable at all events thereafter, is the peculiar liability which the law attaches to improper intermeddling. As this intermeddling makes the whole performance thereafter fundamentally different, this absolute liability should persist until the goods are finally delivered. And very probably this is the law, although some doubts may be entertained after reading the opinions in many leading cases.²⁴

66. Negligence in not avoiding.—Even where the damage is apparently caused exclusively by some overwhelming calamity, nevertheless if the public servant could have foreseen the catastrophe in time to have prevented it,²⁵ or could have avoided the results of it and negligently failed to do so, he will be liable.²⁶ This is brought out in two well known United States Supreme Court cases. In *Express Company v. Kountze Bros.*,²⁷ it was pointed out

²⁴ Note the decisions in *Thorley Ltd. v. Orchis S. S. Co. Ltd.*, (1907) 1 K. B. 660 (Eng.), and in *Atlantic C. L. Ry. Co. v. Hinely Stephens Co.*, 60 So. 749 (Fla.).

²⁵ *Caldwell v. Southern Express Co.*, 1 Flipp 85 (U. S.).

²⁶ *Ewart v. Street*, 2 Bailey 157 (S. C.).

²⁷ 8 Wall 342 (U. S.), LEADING ILLUSTRATIVE CASES.

that, if the carrier chooses the route which would very probably expose the goods to capture by the enemy, it will be liable for their capture. In *Railroad Company v. Reeves*,²⁸ it was pointed out that, unless the carrier failed to exercise due care to save the goods from a rising flood, it would not be held liable. Where the injury may be repaired wholly or partially at the place of accident, and where such a course is peculiarly necessary to prevent further deterioration, the duty to meet the emergency by doing everything possible is obvious. Thus if a cargo has become wet, it should be dried if that is practicable.²⁹ So perishable provisions should be iced if the departure of the carrier has been unavoidably delayed.³⁰

67. Proper protection of patrons.—Of the general obligations to protect those with whom the proprietors of a public service are having business relations, there can be no doubt. One of the first requirements which the government demands of every institution impressed with a public interest, and one which is thrown over every citizen as a great and protective shield, is the duty to act impartially with all.³¹ They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted from others in like circumstances. From this principle,

²⁸ 10 Wall. 176 (U. S.).

²⁹ *Notara v. Henderson*, L. R. 7 Q. B. 225 (Eng.).

³⁰ *Peck v. Weeks*, 34 Conn. 145.

³¹ This paragraph is substantially taken from *Dunn v. Western Union Telegraph Co.*, 2 Ga. App. 845, 59 S. E. 189, LEADING ILLUSTRATIVE CASES.

universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public, as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do, safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety, nor this decency mere absence of obscenity, but by the employment of the expression safe and decent access, it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment.³²

68. Liability for injuries by own servants.—The clearest examples of the affirmative duty to furnish protection are the cases holding the railroad liable for personal assault upon passengers by its employees. The company is responsible for such assaults on passengers while the employees are on duty, although the violence may have no apparent relation to the conduct of the business. Thus in one of the leading cases on this subject, a railroad was held liable for a trainman's kissing of a lady passenger.³³ In the law of private relations when the assault is committed by a servant out of personal spite or in a frolic of his own, many authorities hold that the master is not liable. But practically all the cases as to public employment hold the company liable for its failure to protect its patrons from all as-

³² If the servant precipitates trouble the company is liable for the consequences. *Gooch v. Birmingham Ry. L. & P. Co.*, 58 So. 196 (Ala.).

³³ *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, LEADING ILLUSTRATIVE CASES.

saults whatsoever by any employee whatever.⁸⁴ This is sometimes spoken of as exceptional; but as a matter of fact the apparently extreme liability of the public company in such cases is part of the general duty to protect those in its charge. Indeed, it may help in understanding the law to say that every servant of the company has the duty to protect patrons from injury by himself as well as injury by third parties.

69. Protection from third parties.—Moreover, those engaged in the public services which involve the charge of persons and their belongings are under a stringent liability to use the utmost care in their protection from such injuries from third parties as they ought to have foreseen and could have prevented. This is because there is a special duty to protect patrons from insult by third parties, whoever they may be. Indeed the law is very exacting as to all this, holding the carrier or innkeeper liable for injuries by third parties which ought to have been anticipated. A distinction, it should be noted, is made in these cases which was not made in the preceding paragraph. Wherever, for instance, the trainmen take no steps to protect the hand luggage of a passenger from theft, the company will be held liable.⁸⁵ But where a sudden attack is made upon the passenger which the conductor had no reason to anticipate he is not liable if he cannot get to the aid of the passenger in time.⁸⁶ A railroad is liable for

⁸⁴ *Chesapeake & O. Ry. Co. v. Francisco*, 149 Ky. 307, 148 S. W. 46.

⁸⁵ *Hasbrouck v. New York C. & H. R. R. Co.*, 202 N. Y. 363, 95 N. E. 808.

⁸⁶ *Putnam v. Broadway & S. A. R. R. Co.*, 55 N. Y. 108.

assault on a passenger in the waiting room only if the conditions in that locality are such as to require constant guard to be kept.³⁷ But surely a carrier should not abandon a non-union workingman to a mob which is demanding him, even if this might make it safer for other passengers.³⁸

70. **Avoidance of threatened harm.**—In particular there are many cases describing the liability which carriers are under to protect their patrons while in their charge from injuries to them by their fellow passengers which there was reason to anticipate, either from general circumstances or from particular facts. Injury to passengers resulting from overcrowding at stations is danger for which the carrier is bound to answer and could have taken measures to prevent.³⁹ If so many are taken on board a car that one of the passengers is subsequently crowded off, the carrier is liable, for it should not have permitted the car to get so dangerously overcrowded.⁴⁰ Speaking generally, the carrier must use the utmost care in protecting passengers from all evil doers whatsoever, and there are many well considered cases which support this view; but none of them fail to impose the qualification that the wrong or injury done the passenger by such strangers must have been perpetrated under such circumstances that it might reasonably have been

³⁷ *Batton v. So. & No. Ala. R. R. Co.*, 77 Ala. 591, **LEADING ILLUSTRATIVE CASES.**

³⁸ *Chicago & A. R. R. v. Pillsbury*, 123 Ill. 9.

³⁹ *Pray v. Omaha St. Ry. Co.*, 44 Neb. 167.

⁴⁰ *Dittmar v. Brooklyn Heights R. R. Co.*, 91 App. Div. 378 (N. Y.), 86 N. Y. Supp. 878.

anticipated. Thus a carrier will be liable for injury to passengers by a mob only when the facts were known to it in time to have taken effective action.⁴¹ And the owners of a sleeping car will not be held liable for the assassination of a passenger while the car is standing in the station.⁴²

71. Injuries outside the employment.—When the assault committed by the employees is at some other place than the premises of the company, to which this special duty to protect does not extend, the company may escape liability. Thus where a person waiting for a car outside the car barn was assaulted by an employee the company was not held responsible.⁴³ But where a conductor hurled a passenger from a car and followed this by an attack upon him in the street it was all held a continuous assault for which the company was liable.⁴⁴ Upon similar principles the company is not responsible for failing to protect those who have no business relations with it. Thus it owes no affirmative duty to furnish protection to sightseers upon its premises; nor need it provide protection for passengers after a reasonable time has passed for them to leave the premises.⁴⁵ Still less is it liable for wrong done to a former passenger by a trainman away from the premises of the carrier after the transportation is over.⁴⁶

⁴¹ *Pounder v. Northeastern R. R.*, (1892) 1 Q. B. 385 (Eng.).

⁴² *Connell's Ex'rs. v. Chesapeake & O. R. R. Co.*, 93 Va. 44, 24 S. E. 467.

⁴³ *Palmer v. Winston-Salem Ry. & Elect. Co.*, 131 N. C. 250, 42 S. E. 604.

⁴⁴ *Peeples v. Brunswick & A. R. R. Co.*, 60 Ga. 281.

⁴⁵ *Chicago & A. Ry. Co. v. Tracey*, 109 Ill. App. 563.

⁴⁶ *Missouri K. & T. R. R. Co. v. Pope*, 149 S. W. 1185 (Tex.).

72. Peculiar protection under special circumstances.—In certain callings peculiar care is owed patrons because of the extent to which they intrust themselves to the proprietors. An innkeeper who, without warning, allowed a guest to come to a house where there was a contagious disease was held responsible to a guest who contracted that disease.⁴⁷ Similarly a sleeping-car company is bound to keep continual watch by night to protect sleeping passengers from harm.⁴⁸ Indeed in the case of sleeping cars there is a cumulative liability; the passenger who can show a failure to take every precaution for his safety having the right to sue either the car company or the railroad company. In emergencies, it should be added, every ordinary course should be set aside. Where a passenger is stricken with violent illness a train should be stopped at the next place where medical attendance can be obtained.⁴⁹ And where peaches are rotting the carrier may take the extraordinary step of selling them on the spot.⁵⁰

⁴⁷ *Gilbert v. Hoffman*, 66 Iowa 205, 23 N. W. 632.

⁴⁸ *Campbell v. Pullman P. C. Co.*, 42 Fed. 484.

⁴⁹ *Central of Ga. Ry. Co. v. Madden*, 135 Ga. 205, 69 S. E. 165.

⁵⁰ *American Express Co. v. Smith*, 33 Oh. St. 511.

CHAPTER VIII.

LIABILITY FOR LOSSES.

73. **Proper theory of liability.**—The basis of liability for losses happening in the undertaking is not altogether uniform. What complicates the matter is that the standard of liability for some services differs materially from that of other services. In common carriage and innkeeping our law has for a long time held the proprietors practically liable absolutely as insurers for loss of the goods intrusted to them. To this liability as an insurer, however, there are, as will be seen, at least four well-established exceptions—the act of God, the king's enemies, vice of the goods, and interference of the patron. In all other public callings the most that the law holds the proprietor liable for under any circumstances is the highest practicable standard of care. It should, however, be emphasized that the liability as an insurer imposed upon the carrier and the innkeeper is as abnormal in public service as it is in private business. It is imposed only upon carriers of goods, not upon carriers of passengers; it applies to the protection of the guest's belongings, not of his person. It is not applied to any other public callings, however similar they may be to carriage and innkeeping; and it is only imposed when the service in question is being rendered upon a basis that such service is of a public nature.

74. Liability as an insurer.—As to the carrier of goods there is a tradition that its extreme responsibility as a virtual insurer by law is a result of its vocation, which gives it peculiar opportunities for appropriating the property of the shipper. As a matter of fact, there was no case holding the carrier responsible as an insurer until the time of Lord Mansfield.⁵¹ But as the law has been since that time a carrier is thus liable as an insurer, whether or not the loss or injury is its fault, or whether or not it contributes in any way to the loss. The most striking cases of this sort in modern times were those holding carriers liable for the damage done to goods in their charge by such fires as the Chicago fire, where not the slightest negligence could be imputed to them in any respect.⁵² In England⁵³ today the innkeeper is held liable for all loss, except that caused by the act of God, or the king's enemies. In America⁵⁴ perhaps a majority of the states hold the innkeeper liable to the same extent as a common carrier; but there are many jurisdictions which hold him liable only for failing to guard the goods of guests.

75. No insurance for personal injuries.—Strange as it may seem, this law that holds the common carrier of goods as an insurer of them does not extend to public carriers of passengers, such carriers being held liable only for negligence. Until the middle of the nineteenth century this whole matter was in doubt both in this country and abroad. Carriage

⁵¹ *Forward v. Pittard*, 1 T. R. 27 (Eng.), LEADING ILLUSTRATIVE CASES.

⁵² *Merchants' Despatch Co. v. Smith*, 76 Ill. 542.

⁵³ *Richmond v. Smith*, 8 B. & C. 9 (Eng.).

⁵⁴ *Mason v. Thompson*, 9 Pick. 280 (Mass.).

of passengers is comparatively recent, and in the first cases there was a disposition to hold the proprietor of the coach to warrant its roadworthiness.⁵⁵ Soon after the introduction of the railroad it was established by the courts that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers.⁵⁶ The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.⁵⁷ The same applies to innkeeping; the innkeeper is at most responsible for proper care in the protection of his guest; whereas he is liable as an insurer of the belongings of the guest within his inn.⁵⁸

76. Only compensated service insured.—It has always been law that free service is not common carriage within the rule holding carriers as insurers.⁵⁹ But many services, loosely spoken of as free, may be seen not to be gratuitous upon an examination of all the facts. Thus, where in the case of grain shipments the bags are returned without further charges it is properly held that there is sufficient considera-

⁵⁵ Compare *Bremner v. Williams*, 1 C. & P. 414 (Eng.), *LEADING ILLUSTRATIVE CASES*, and *Ingalls v. Bills*, 9 Met. 1 (Mass.).

⁵⁶ See *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379 (Eng.), and *Thayer v. Old Colony St. Ry. Co.*, 101 N. E. 368 (Mass.).

⁵⁷ *Boyce v. Anderson*, 2 Pet. 150 (U. S.), (not an insurer of slaves), *LEADING ILLUSTRATIVE CASES*.

⁵⁸ *Sandys v. Florence*, 47 L. J. C. P. 598 (Eng.), (not an insurer of guests).

⁵⁹ *Fay v. The New World*, 1 Cal. 348.

tion for the whole transaction to make the carrier liable as an insurer when bringing them back.⁶⁰ So, in the case of shipments C. O. D., it is properly held that the carrier is liable strictly as such in bringing back the funds collected.⁶¹ Where the service is in reality gratuitous, however, the carrier is liable only for wanton injury or gross negligence.⁶² Not being in the least engaged in public employment in gratuitous service the carrier is not bound therein to the utmost care, or even due care.

77. Carriage of baggage compensated.—The carrier from time immemorial has taken the necessary luggage of the passenger along with him without additional charge. The carriage of this proper baggage is included, according to the general understanding, in the price paid by the passenger for his transportation. But baggage strictly includes only those things necessary for the convenience of the traveler during his journey. The carrier is liable for the traveling paraphernalia of the passenger, such as clothing and toilet articles.⁶³ But it is not liable for any merchandise which he may be taking along with him in his trunks, such as cloths and bric-a-brac.⁶⁴ Moreover, as baggage is theoretically for use during the journey, it must go with the carrier.⁶⁵ If, therefore, it is sent otherwise than along with the passenger, the carrier is not responsible.⁶⁶

⁶⁰ *Pierce v. Milwaukee & St. P. R. R. Co.*, 23 Wis. 387.

⁶¹ *The Emma*, Fed Cas. No. 18218.

⁶² *Perkins v. Wright*, 37 Ind. 27.

⁶³ *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24.

⁶⁴ *Michigan Central R. R. Co. v. Carrow*, 73 Ill. 348.

⁶⁵ *Beers v. Boston & A. R. R. Co.*, 67 Conn. 417, 34 Atl. 541.

⁶⁶ *Wilson v. Grand Trunk R. R. Co.*, 56 Me. 60.

But, if the carrier forwards it by another conveyance for its own convenience, the case is different.

78. Abnormal liability rigidly confined.—It is significant that the carrier's liability as an insurer is not extended to other employments, however analogous, even when conducted upon a public basis. Bridge proprietors⁶⁷ are differentiated from carriers, because they do not take possession; and wharfingers⁶⁸ are held not to be carriers, because they do not transport. Telegraph companies have been called carriers, and irrigation companies conveyors; but never have the courts acted upon this language to the extent of holding them liable as insurers. The treatment of employments analogous to innkeeping, has been similar. A restaurant, as has been seen, is not considered an inn, because only food can be had there; and a lodging house is not an inn, because one may only sleep there. Although a steamboat⁶⁹ with rooms and meals is much like an inn, and a sleeping-car⁷⁰ with a buffet differs but little, the cases are almost unanimous in holding that there is no insurance liability in connection with these services.

79. Extent of normal liability.—Illustrations of the true extent of liability in public employment according to modern notions, may be drawn from the other public callings indiscriminately. These are all businesses of the highest importance, requiring a proportionate degree of care in their conduct. To

⁶⁷ *Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co.*, 37 Fed. 567.

⁶⁸ *Chattock & Co. v. Bellamy & Co.*, 64 L. J. Q. B. 250 (Eng.).

⁶⁹ *Clark v. Burns*, 118 Mass. 275.

⁷⁰ *Dings v. Pullman Co.*, 154 S. W. 446 (Mo. App.).

require an extraordinary degree of care and skill in the business of sending messages by telegraph⁷¹ well exemplifies the general rule of care proportioned to the service undertaken. This requires special skill as well as unusual care; if the work is peculiarly difficult, greater skill is required. Similar rules are laid down for the provision of proper service by telephone companies. They must maintain the plant according to the highest standard of the art.⁷² In the case of water supply⁷³ the companies are not held to guarantee the purity of the water furnished; and, indeed, nothing like absolute purity is to be expected when the supply must be taken from the turbid streams of the locality.⁷⁴ But the company will be held liable for supplying polluted water, where their negligence in not safeguarding their water supply is shown.

80. Public businesses requiring peculiar care.— In regard to the liability of gas companies to their patrons in course of supplying them, the cases from the outset have held the companies to that high degree of care which the peculiar circumstances of this service demands.⁷⁵ They deal in, and furnish to, their patrons a dangerous, deadly, explosive, and inflammable element; and they are, therefore, held to the highest degree of care and caution, including a continuing duty of oversight and inspection. It is

⁷¹ *Leonard v. New York A. & B. E. M. Telegraph Co.*, 41 N. Y. 544, **LEADING ILLUSTRATIVE CASES.**

⁷² *McLeod v. Pacific Telephone Co.*, 52 Ore. 22, 94 Pac. 568.

⁷³ *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N. W. 722.

⁷⁴ *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196.

⁷⁵ *Holly v. Boston Gas Light Co.*, 8 Gray 123 (Mass.).

equally obvious that there are peculiar dangers to all concerned in the supplying of electricity.⁷⁶ If a death-dealing current is permitted to enter a customer's house through a defect in the transformer, which could have been detected, the company is uniformly held liable. It must do everything to avoid such accidents that human care, skill, and vigilance can suggest. What the law requires of those who profess a public employment is the utmost foresight, such as the peculiar importance of these special services imperatively requires.

81. Act of God as an excuse.—The act of God, which is a universal excuse, is such an inevitable accident as results immediately from natural causes, and is in no way attributable to human agency. Common examples of what are termed acts of God are tempests, earthquakes, tidal waves, and floods.⁷⁷ Loss arising from these causes is not charged to the proprietors of the service. Fire caused by spontaneous combustion or lightning is considered inevitable accident, and so excuses the carrier. Sudden changes in conditions are acts of God, unexpected frosts and extreme heat. Electrical disturbances and atmospheric conditions also may excuse as acts of God. In order to establish the excuse of act of God it must be shown that there was no human agency involved in the catastrophe.⁷⁸ If, by failure of the wind, a vessel is driven upon the shore, notwithstanding the

⁷⁶ *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571, 58 Atl. 1068.

⁷⁷ *Wald v. Pittsburg C. C. & St. L. Ry. Co.*, 162 Ill. 545—the Johnstown flood held an excuse.

⁷⁸ See *Gilbert Bros. v. Chicago, R. I. & P. R. R. Co.*, 136 N. W. 911 (Iowa), for an enumeration of the exceptions.

efforts of its navigators, the loss is by act of God.⁷⁹ But if a ship, while being steered in its usual course, runs upon the wreck of another ship, which had been sunk below the surface of the water in mid-channel by a sudden squall, the loss is held to be brought about by act of man.⁸⁰

82. Damage by public enemies.—From time immemorial seizure by the king's enemies has been an excuse in public service, even where the general rule is that of absolute liability. As a foundation for the excuse a state of war must exist between the community to which the carrier belongs and the country whose forces have made the seizure. The American cases chiefly relate to the situation at the time of our Civil War. It was finally generally agreed that the Confederate Government was so far *de facto* as not only to make its forces public enemies to federal carriers,⁸¹ but also to make the federal forces enemies to confederate carriers.⁸² Damage caused by mere marauders does not come within the excuse,⁸³ and if a carrier be robbed by a hundred men, he is none the more excusable. Where the absolute liability as an insurer exists, the fact that the goods are injured or seized by a mob of rioters which the carrier is absolutely unable to resist furnishes no excuse, however unexpected the attack may have been.⁸⁴

⁷⁹ *Colt v. McMechen*, 6 Johns. 160 (N. Y.), *LEADING ILLUSTRATIVE CASES*.

⁸⁰ *Merritt v. Earle*, 29 N. Y. 115.

⁸¹ *Bland v. Adams Express Co.*, 1 Duv. 232 (Ky.).

⁸² *Wallace v. Sanders*, 50 Ga. 134.

⁸³ *Seligman & Bro. v. Armijo*, 1 N. Mex. 459.

⁸⁴ *Pittsburg C. C. S. & St. L. Ry. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022.

83. **Vice of the property.**—There is also an established excuse if the loss happens by deterioration or by disintegration of the goods in transit, whether this is due to inherent characteristics or precipitated by external factors. If, for example, the loss happens by a freezing in winter or by rotting in summer,⁸⁵ there is this apparent excuse. Likewise a loss caused by the fermentation of the molasses⁸⁶ being carried, or by the decay of the fruit in transit, will be excused. In any case, the deterioration of the goods must be the sole result of natural causes. This excuse finds its chief scope in the law relating to the carriage of animals. It is almost universally agreed that this is common carriage with all the law thereto applying; but, since animals are being dealt with, losses which can be traced primarily to their proper vice are held excused.⁸⁷ Of course special care must be taken of animals because they are alive; and in emergencies unusual steps must be taken to save them. But if, notwithstanding due care for them, they injure themselves, or die by accident, the carrier may not be held liable.⁸⁸

84. **Interference by the patron.**—Where the patron interferes and takes a hand in the services, there is another exception to the insurance liability. Thus, where the shipper put hay into a stock

⁸⁵ *Funsten Fruit Co. v. Toledo St. L. & W. Ry. Co.*, 163 Mo. App. 426, 143 S. W. 839.

⁸⁶ *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002.

⁸⁷ *Kansas Pacific R. Co. v. Nichols, Kennedy & Co.*, 9 Kans. 235.

⁸⁸ *Conpland v. Housatonic R. R. Co.*, 61 Conn. 531, 23 Atl. 870, **LEADING ILLUSTRATIVE CASES.**

car, in violation of regulations of the company forbidding the putting of combustibles into a car, it was said that the carrier should not be held liable for a subsequent loss by fire.⁸⁹ Similarly, where a servant of the shipper accompanying stock took a lantern into the car, which set the car on fire, it was held that the railroad was not liable, whether the lantern was handled negligently or not.⁹⁰ If the shipper assumes the responsibility for securing the goods upon the vehicle, the carrier is then relieved from liability for loss caused thereby.⁹¹ But if the improper loading should have been apparent to the carrier, from the ordinary inspection which it or its servants would naturally give, the carrier will be liable.⁹²

⁸⁹ *Pratt v. Ogdensburg & L. C. R. R. Co.*, 102 Mass. 557.

⁹⁰ *Hart v. Chicago & N. W. Ry. Co.*, 69 Iowa 485, 29 N. W. 597.

⁹¹ *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645, 49 N. E. 215.

⁹² *Elgin J. & E. Ry. Co. v. Bates Machine Co.*, 200 Ill. 636, 66 N. E. 326.

CHAPTER IX.

SPECIAL LIMITATION OF LIABILITY.

85. **Limitation upon liability possible.**—It may well be that the abnormal liability of an insurer which the law imposes upon the carrier and the inn-keeper may be cut down by special arrangement. Indeed, in discussing the insurance liability in the preceding chapter no good reason was apparent for so onerous an obligation. But it would seem to be against public policy for a public servant to go further and stipulate that he shall not be liable for his negligence in the performance of his undertaking. At all events this distinction is the one which is generally taken by the courts, which allow limitation of liability as an insurer, while declaring void stipulations against liability for negligence. A contract being found, the question becomes one of public policy rather than positive law. The only issue then is whether the contract in question is truly inconsistent with the maintenance of that high standard which public service demands. And it follows that where the service in question is not public in character, or is not being rendered upon a public basis, there is no objection to a special contract reducing liability to the lowest terms. There is no public policy of the sort described involved in private employment of this character.

86. **Special contract must be found.**—According to the early English cases⁹³ it was possible, by a mere notice to that effect, to relieve one's self from the insurance obligation. But today such notice is held insufficient in itself to make out a special contract, unless it may fairly be said to have been expressly incorporated in an actual contract between the parties. But a special contract, if it has all the requisite elements for a contractual obligation, may in almost all jurisdictions be made, and by its operation the normal common law liability may be limited to a greater or less extent.⁹⁴ The company, it would seem however, may not force its patrons to make such special contracts; they should enter into them voluntarily. But, generally speaking, one who has common law rights may bargain them away, unless the contract is against public policy. The acceptance of an instrument commonly used to embody the contract, such as a bill of lading, will usually be conclusive proof of the contract it evidences.⁹⁵ The law presumes, in the absence of fraud or imposition, that the patron read it, or was willing to assent to its terms without reading it.⁹⁶

87. **Limitation of liability as insurer.**—Exceptional liability—such as that making the common carrier of goods liable as an insurer—may be done away with by a special contract properly made. By the overwhelming weight of authority, it is conceded that a contract which goes no further than this is

⁹³ *Mayhew v. Eames*, 3 B. & C. 601 (Eng.), LEADING ILLUSTRATIVE CASES.

⁹⁴ *Cau v. Texas & P. R. R. Co.*, 194 U. S. 427, 24 Sup. Ct. 663.

⁹⁵ *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318 (U. S.).

⁹⁶ *Grace v. Adams*, 100 Mass. 505.

not against public policy.⁹⁷ And, indeed, a contract which only relieves from liability a carrier who has exercised the utmost human foresight certainly cannot be said really to tend in any way to impair that efficiency which is requisite in a public service.⁹⁸ According to modern notions of responsibility, there is very rarely reason enough to make a party to whom no fault can be attributed liable for a loss. Certainly there is no argument in favor of such responsibility strong enough to declare against public policy a contract limiting liability to blameworthy conduct.⁹⁹ If there ever was any reason for making the carrier liable as an insurer, that reason no longer has sufficient force to set aside the contract of the parties. There is reason enough for holding those in public employment to the highest standard in performing that service. But there is no sufficient foundation for adding the insurance business to common carriage and making them inseparable.¹

88. **Policy against excepting negligence.**—Public policy demands of common carriers and all others in public employment that they shall exercise due care and all possible vigilance. Hence the carrier of goods is forbidden by the cases generally to limit its liability for negligence by contract with the shipper.² It may not contract against the consequences of its own or its employees' negligence even if the

⁹⁷ *Railroad Co. v. Lockwood*, 17 Wall. 357 (U. S.), LEADING ILLUSTRATIVE CASES.

⁹⁸ *Hoadley v. Northern Transportation Co.*, 115 Mass. 304.

⁹⁹ *Davis v. Central Vt. Ry. Co.*, 66 Vt. 290, 29 Atl. 313.

¹ *Boorman v. American Express Co.*, 21 Wis. 152.

² *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174.

shipper is willing—and such a contract will not relieve or excuse it from liability.³ The real reason for this seems to be that if such contracts were permitted they would be universally required; and this would result in an inevitable deterioration in public service.⁴ Indeed, that the invalidity of such exemptions is due to the public character of the service is shown by the fact that when the matter under contract does not directly pertain to the public service, as such, the contract is held valid. Jurisdictions are few indeed where a limitation upon liability for negligence in a public service is permitted; and even in those states the contract must be in the plainest language to cover negligence.⁵ The argument in favor of permitting such limitations is that parties should be free to contract as they please. But the overwhelming weight of authority against permitting such limitation is proof positive that it is against public policy.

89. Invalidity of special stipulations.—A provision in a special contract with a water taker that he would not hold the city liable for its negligence in supplying water, is void.⁶ Likewise a contract between an electric lighting company and its patron, stipulating that it should not in any event be liable for damage to person or property arising or resulting from the use of light, is against public policy.⁷

³ *Southern Exp. Co. v. Moon*, 29 Miss. 822.

⁴ *Maslin v. Baltimore & O. R. R. Co.*, 14 W. Va. 180.

⁵ *Mynard v. Syracuse B. & N. A. R. R.*, 71 N. Y. 180; **LEADING ILLUSTRATIVE CASES.**

⁶ *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

⁷ *Denver Consolidated Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39.

A stipulation by a telephone company that it would not be liable for messages delivered will not protect it against a suit for default if the service in question is shown to be part of its regular course of business.⁸ And a gas company is liable for an explosion notwithstanding a stipulation in the original application to the company exempting the company from damages by explosion.⁹ A telegraph company cannot stipulate against liability for negligence;¹⁰ but most inconsistently it is generally held that liability for negligence may be excepted in the case of an unrepeatd message.¹¹

90. Limitation of amount recoverable.—Stipulations limiting the recovery to an agreed amount in case of loss by negligence do not, however, necessarily tend to defeat public service, and therefore are not held against public policy by the great majority of cases. It is difficult to see how any considerations of sound public policy require that such contracts should be held invalid. It seems clear that a person, who in such a contract fixes a value upon his goods which he intrusts to the carrier, should be bound by his valuation.¹² Furthermore, where a limitation is made to a set amount fixed by the company in the special contract for shipment at a certain rate, the patron (having the alternative to ask

⁸ *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.

⁹ *Bastian v. Keystone Gas Co.*, 27 (N. Y.) App. Div. 584, 50 N. Y. Supp. 537.

¹⁰ *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. 495.

¹¹ *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, LEADING ILLUSTRATIVE CASES.

¹² *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752.

service upon a common law basis) is bound by the stipulation even in case of the carrier's negligence.¹³ In some jurisdictions, however, these rules are denied, the thoroughgoing doctrine being that it is always contrary to the policy of the law that a public servant should ever be permitted to stipulate for any exemption from liability for defaults for which he is to blame.¹⁴ And indeed it would probably be generally agreed that where the value set is so small as virtually to relieve the company from liability, such a stipulation should be set aside as practically the same thing as a limitation of liability for negligence. But if it is provided that the carrier is always chargeable in a substantial amount for negligence, that may well be enough to keep him sufficiently careful in the conduct of the service.¹⁵

91. Other stipulations as to liability.—In view of these general principles the usual stipulation in the contract of carriage, that notice of loss must be given to the carrier within a time fixed, should obviously be held valid. Such stipulations do not purport to relieve the companies from any part of their obligations as common carriers, for they are bound to the same diligence, fidelity, and care as they would have been required to exercise if such agreement had not been made.¹⁶ It is agreed that such stipulations are not against public policy if a reasonable

¹³ *Hart v. Pennsylvania R. R.*, 112 U. S. 331, 5 Sup. Ct. 151, LEADING ILLUSTRATIVE CASES.

¹⁴ *Everett v. Norfolk & S. R. R.*, 138 N. C. 68, 50 S. E. 557.

¹⁵ *Missouri K. & T. R. R. v. Harriman Bros.*, 33 Sup. Ct. 397.

¹⁶ *Express Co. v. Caldwell*, 21 Wall. 264 (U. S.), LEADING ILLUSTRATIVE CASES.

time—say ninety days or thereabouts—is allowed.¹⁷ But, when one was required to file proof of loss before the time when it would naturally be known, the proviso was held unreasonable.¹⁸ There has been much litigation concerning the validity of the usual stipulation in telegraph blanks requiring the party aggrieved by the fault of the company to file his claim within a relatively short time.¹⁹

92. Restrictions applicable to special service.—The rules which have just been stated apply only to public service, as there is no such public policy otherwise. Thus carriers of passengers may exempt themselves from liability for car employees and train boys.²⁰ Railroads may stipulate against liability for express matter and circus trains.²¹ There need be no liability for cars and their contents upon private sidings before and after transportation,²² and a carrier may stipulate against liability for losses beyond its own lines.²³ Where private service is being rendered there is no liability for such service which cannot be contracted away, and generally speaking where one performs service beyond his public obligation, he may make such terms concerning it as he pleases, without its being obnoxious to the rules under consideration. The whole matter,

¹⁷ *Hatch v. Minneapolis St. P. & S. S. M. Ry. Co.*, 15 N. D. 491, 107 N. W. 1037.

¹⁸ *Wabash R. R. v. Thomas*, 222 Ill. 337, 78 N. E. 777.

¹⁹ *Wolf v. Western Union Telegraph Co.*, 62 Pa. St. 83.

²⁰ *Griswold v. New York & N. E. R. R. Co.*, 53 Conn. 371, 4 Atl. 261.

²¹ *Coup v. Wabash, St. L. & P. Ry. Co.*, 56 Mich. 111, 22 N. W. 215, **LEADING ILLUSTRATIVE CASES.**

²² *Mann v. Pere Marquette Ry. Co.*, 135 Mich. 210, 97 N. W. 721.

²³ *St. John v. Southern Exp. Co.*, 1 Woods 612 (U. S.).

so far as this chapter is concerned, is dependent upon whether the service in question is public. And it will be remembered, too, that the instances referred to in this paragraph have already been discussed in other connections as not within the law governing public employment.

93. Liability in gratuitous service.—Where the service is gratuitous there is no obligation to undertake it upon a public basis. Therefore where service is being rendered without there being any compensation involved in the transaction, the special law of the public service does not apply. But, where a jack was shipped by a steamboat without anything being said about compensation, the court held that in the absence of a special understanding it would be assumed that the carriage was for hire and the carrier liable as an insurer.²⁴ Although not obliged to perform gratuitous service upon the usual terms, the one who is performing such service may assume the usual obligations which pertain to it. Thus there is no doubt among the authorities that a person carried gratuitously by a railroad is a passenger, and is entitled to the same care as any passenger.²⁵ It should, however, be plain that a carrier who is carrying a passenger gratuitously does not necessarily owe him the duty owed by a common carrier. Although it is obliged to take care even of a gratuitous passenger, still the obligations of the common carrier do not bind it. The question commonly arises as to the validity of a stipulation against lia-

²⁴ *Knox v. Rives, Battle & Co.*, 14 Ala. 249.

²⁵ *Quimby v. B. & M. R. R.*, 150 Mass. 365, LEADING ILLUSTRATIVE CASES.

bility for injury by negligence. Such an exemption is generally held binding, though in the case of a common carrier it would be void.²⁶ It is now appreciated that the railway company is not truly in such a case acting upon a public basis, although there were once decisions the other way.²⁷

94. Liability to their employees.—When a railroad is transporting its own employees without charge, 'there is another distinction to be taken which will make the solution of the problem easier. If the carriage is directly in connection with the work, the relation to the carrier is plainly that of a servant and not that of a passenger, as where a workman on a gravel train is taken from place to place as his services are needed.²⁸ The decision is the same where employees are being taken to and from their job in work trains.²⁹ If, however, the employee receives in addition to his regular compensation a pass giving him the right to travel as passenger, then he should be regarded as a passenger, nothing appearing to the contrary.³⁰ Special tickets given employees to go to their work may, indeed, be regarded as part of the compensation of the employee.³¹ The whole question in these cases is whether one is engaged in the service or whether a service is being received.

95. Persons engaged in dependent service.—In the majority of cases mail clerks and express mes-

²⁶ *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408.

²⁷ *Jacobus v. St. Paul & C. Ry. Co.*, 20 Minn. 125.

²⁸ *Evansville & R. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092.

²⁹ *Ionnone v. New York N. H. & H. R. R. Co.*, 21 R. I. 452, 44 Atl. 592.

³⁰ *Dickinson v. West End St. Ry.*, 177 Mass. 365, 59 N. E. 60.

³¹ *Indiana Traction Co. v. Langley*, 98 N. E. 728 (Ind.).

sengers, although traveling in the cars appropriated for the special service, are said to be passengers, for it is pointed out that their transportation is included in the sum paid the railroad by the government.³² It is, however, generally recognized that as they are necessarily carried in a different car from a passenger coach, to the extent to which it is dangerous to travel in such a car instead of the ordinary passenger car, they take the risk of injury peculiar thereto.³³ On the other hand, it is generally said that, as the carrier is not bound to receive them as passengers, it may make such arrangements as it pleases with regard to terms of carriage and its liability for injury.³⁴ In other words these persons may be taken upon a public or a private basis, as the facts may show. There are, however, some radical cases deserving of consideration where the fundamental principle in all this is said to be that the carrier cannot make stipulations against liability for injuries to persons being transported in connection with the matters as to which it owes a duty, obliging it to permit persons to travel in the way described as a matter of right.³⁵

96. Real basis of the service.—The matters discussed in this chapter are well worth serious consideration. The questions involved are two upon analysis; and these are the most fundamental ones in the law governing public service. First: Have we a case of public service in the facts before us?

³² *Cleveland C. C. & St. L. Ry. v. Ketcham*, 133 Ind. 346, 33 N. E. 116.

³³ *Barker v. Chicago P. & St. L. Ry. Co.*, 243 Ill. 482, 90 N. E. 1057.

³⁴ *Baltimore & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385.

³⁵ *Baker v. Boston & M. R. R. Co.*, 74 N. H. 100, 65 Atl. 386.

It can be shown not to be a case of public service, if the business itself is not in general public in character; or if in particular there has been no undertaking to perform the service in question upon a public basis. Second: Granting that a public service is being rendered, will a special contract relating to the liability during the service be given effect? This special arrangement in turn may fail for one of two reasons: either there is no good contract at all, for lack of initial consent or consideration, or else, if the contract is found, it will be held to be against public policy, as tending to relax those high standards of care in the performance of public service upon which our law is so insistent.

CHAPTER X.

TERMINATION OF THE SERVICE.

97. **When the undertaking is over.**—The obligations imposed by law upon those in public service are conceived of as continuing throughout the service undertaken without interruption from its beginning to its end. Thus the extraordinary liability which makes a carrier practically an insurer continues so long as the public service which it has undertaken is being performed; but after carriage may be said to be over the carrier is simply under the obligation to exercise due care. Here is a case where the extent of the undertaking assumed in the performance of a public service is minutely measured, for the special liability attaches only so long as this public service is being performed. Aside from this particular problem there is the general problem of the proper termination of all liability by completed performance. A carrier may not altogether rid itself of its responsibility for goods which it has carried until it properly parts with possession of them. This is, to a large extent, a question of the full scope of the particular undertaking, which would involve detailed description of the usual course of each particular business, if it were to be treated in detail.

98. **End of the transportation.**—A common carrier, as such, undertakes only transportation to a certain place. When it has deposited the goods at

that point on the route it would seem that it has done all that it has professed; and it seems, therefore, that its exceptional liability as a common carrier should then terminate.⁸⁶ From this necessary condition of the railroad business and from the practice of these transportation companies of having platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places ready to be delivered, most courts are of the opinion that the duty assumed by the railroad corporation is that it will carry the goods safely to the place of destination, and there discharge them on the platform and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith, or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for.⁸⁷

99. Reasonable time after notice.—In a great number of cases the rule is stated to be that the common carrier is an insurer of the goods until the expiration of a reasonable time for the consignee to get them after the transit is completed.⁸⁸ If the consignee is present upon the arrival of the goods these cases agree that he must take them without unreasonable delay. But if he is not present these cases argue that the carrier must notify him of the

⁸⁶ *Mohr & Smith v. Chicago & N. W. R. R. Co.*, 40 Iowa 579.

⁸⁷ *Norway Plains Co. v. Boston & M. R. R. Co.*, 1 Gray 263 (Mass.), from which the paragraph above is virtually quoted.

⁸⁸ *Bobbink v. Erie R. R.*, 82 Atl. 877 (N. J.).

arrival of the goods; and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier may place the goods in its freight house; and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases.³⁹ If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them and does not, he may not hold the carrier as an insurer.

100. **Obligation of personal delivery.**—The service assumed in common carriage does not necessarily go so far as to impose upon the common carrier the obligation of seeking out the consignee, and offering to make delivery to him personally. But personal delivery is professed in certain kinds of carriage, and in such businesses it is therefore owed. If delivery is refused, or the consignee cannot be found, the consignor should be notified, and the goods held for him as a warehouseman, unless the goods are perishable, in which case they may be sold for his account.⁴⁰ This distinction is marked in modern times by the difference between the railroad business as it is usually conducted, where delivery to the consignee is not undertaken beyond its own rails, and the express business, where facilities are usually provided for delivery to the addressee personally. Express companies generally undertake personal delivery to the consignee, and they are, therefore, liable as com-

³⁹ *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505, LEADING ILLUSTRATIVE CASES—from which the above paragraph is virtually quoted.

⁴⁰ *Missouri K. & T. R. R. v. Cox*, 144 S. W. 1196 (Tex. Civ. App.).

mon carriers until delivery, or rather until they have made reasonable efforts to deliver.⁴¹ And obviously the same rules of law govern the performance of the telegraph companies' obligation to get the message to the sendee.

101. Surrender of goods.—The modern railroad company provides for delivery of goods at its established stations.⁴² The railroad company, moreover, is generally bound to unload the goods from the cars before delivery may usually be said to have taken place. But when coal, ore, grain, or oil are shipped in bulk and in carload lots, as they generally are, the consignee may properly insist, if he has a private siding connected with his premises, or if there is a public siding adjoining his premises, that the cars shall be shunted to his premises, for only in this way can such bulk freight be conveniently unloaded.⁴³ In practically all cases where delivery at private siding is conceded, it is held that when the car is placed upon the siding the liability of the carrier ceases.⁴⁴ And this may also be true where at request of the consignee the car is put upon a special siding and he is given access thereto.⁴⁵

102. Setting down passengers.—The obligation to the passenger upon a railroad is fully performed when the passenger has been allowed to alight at the station of his destination and has safely left, or

⁴¹ Bullard v. American Express Co., 107 Mich. 695, 65 N. W. 551.

⁴² Louisville & N. R. Co. v. Higdon, 149 Ky. 321, 148 S. W. 26.

⁴³ Olanta Coal Co. v. Beech Creek R. Co., 144 Fed. 150.

⁴⁴ Independence Mills Co. v. Burlington C. R. & N. R. R. Co., 72 Iowa 535, 34 N. W. 320.

⁴⁵ Rice v. Boston & W. R. Corp., 98 Mass. 212, LEADING ILLUSTRATIVE CASES.

has a reasonable opportunity safely to leave, the station.⁴⁶ In the case of a street railway company it is fulfilled by leaving the passenger when he has arrived at his destination, safely in the street.⁴⁷ It has been held that, if passengers are given permission to remain upon the conveyance for a time after their destination is reached, they will remain passengers until they have had a reasonable time to leave in addition to the extension of time granted.⁴⁸ But the act of a passenger remaining upon the premises of the carrier after arriving at his destination for an unreasonable time deprives him of his rights as a passenger. And if the passenger jumps off the car, he can complain that the company did not protect him. It would seem, however, that the passenger should be warned of an approaching danger of which he obviously is not aware.⁴⁹

103. Performance according to instructions.—It would seem that completion of performance, according to the instructions given by the person entitled to give directions, would always be justifiable, in the absence of complicating circumstances. Thus, delivery to the consignee would normally be a discharge from all further liability; and so would delivery to the consignor be, if title has not passed to the consignee.⁵⁰ But delivery to the true owner under any circumstances will be a full excuse to the

⁴⁶ *Louisville & N. R. R. Co. v. Keller*, 104 Ky. 768.

⁴⁷ *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, **LEADING ILLUSTRATIVE CASES.**

⁴⁸ *Chicago, K. & W. Ry. Co. v. Frazer*, 55 Kans. 582, 40 Pac. 923.

⁴⁹ *Montgomery St. Ry. Co. v. Mason*, 133 Ala. 508, 32 So. 261.

⁵⁰ *Louisville & N. R. R. Co. v. Britton*, 149 Ala. 552, 43 So. 108.

carrier, no matter with whom it has had dealings.⁵¹ Where a bill of lading is issued, delivery according to its terms will usually be considered the performance of the undertaking; and, therefore, it is often said that the carrier may require the production of the bill of lading before it can be asked to deliver the goods. A distinction should be made, however, which is not invariably observed. A carrier which has issued an "order" bill of lading delivers the goods to anyone else than the holder of the bill of lading at its peril, as the commercial community deals with such bills as representing the goods themselves.⁵² But it is usually held otherwise as to the "straight" bill of lading, for it would be hampering business too much to hold the carrier liable for delivering to the addressee without his producing the bill.⁵³

104. Delivery to the designated person.—Delivery by the carrier to a person other than the person designated or his authorized agent is a misdelivery, for which the carrier is absolutely liable, even if there is no negligence that can be imputed to it.⁵⁴ But if the negligence of the shipper is a factor in the mistake, then the carrier is excused, as where the address of the consignee is so wrongly given as naturally to mislead the carrier. It makes no difference what care the carrier may have taken in deciding which is the proper person to whom to de-

⁵¹ *Stiles v. Davis & Barton*, 1 Black 101 (U. S.).

⁵² *Arkansas Southern Ry. Co. v. German Nat'l Bk.*, 77 Ark. 482, 92 S. W. 522.

⁵³ *Forbes v. Boston & L. R. R. Co.*, 133 Mass. 154.

⁵⁴ *Illinois Central R. R. Co. v. Parks*, 54 Ill. 294.

liver the goods.⁵⁵ The rule is that the carrier must, at its peril, fulfill its obligation by delivering to the right person. There is a noteworthy conflict of authority in that class of cases where a swindler, taking a name and address practically the same as that of an established concern in good credit, orders goods shipped to him. When the carrier subsequently delivers the goods to the swindler, it is in many cases held liable for a misdelivery, and held responsible, therefore, for the loss of the goods.⁵⁶ But there are strong opinions to the effect that in such cases this is delivery by the carrier to the party designated by the consignor, and that it is, therefore, a proper performance of the obligation.⁵⁷

⁵⁵ *Lake Shore & M. S. R. R. Co. v. Hodapp*, 83 Pa. St. 22.

⁵⁶ *Price v. Oswego & S. R. R. Co.*, 50 N. Y. 213.

⁵⁷ *Samuel v. Cheney*, 135 Mass. 278, *LEADING ILLUSTRATIVE CASES*.

PART III
OBLIGATIONS OF PUBLIC
EMPLOYMENT

CHAPTER XI.

JUSTIFICATION FOR REFUSING SERVICE.

105. **Grounds for refusing service.**—The principles of public service already discussed establish the *prima facie* duty resting upon one who is committed to a public employment to serve all who come within his public profession. To excuse himself from rendering such service he must show justification, and that excuse must be based upon public policy. Once committed to public employment he can no longer refuse his service at his caprice. When the obligation of public service is clearly established, by showing that there is a plain case within the public undertaking, all conditions precedent being satisfied, the only method of avoiding liability is to show that there is justification for the suspension of service in general, or some special excuse for the particular refusal.

It is obvious that justification for refusal to serve must be upon reasonable grounds, relating to the performance of the service in question, and such excuse must show that the particular request is truly

improper.⁵⁸ It will be noted throughout this chapter that this justification by which one engaged in public service may refuse service is not confined to those obvious cases where rendering the service would involve the proprietor as a participant in illegality of some sort. The true extent of public duty depends in last analysis upon public policy.

106. Subservience to governmental authority.—Obedience to executive orders constitutes the most obvious head of justification for refusal to serve. Thus military necessity might justify the declaration of an embargo, in which case a steamship line would be obliged to tie up its vessels and refuse further freight. Similarly departmental regulations forbidding the passing of trains into territory opened for settlement until noon of a certain day may be shown in justification of interruption of service.⁵⁹ The same excuse results from obedience to the lawful commands of another of the third great departments exercising governmental authority—the judiciary. Perhaps the plainest case of this justification was where an irrigation company of which the service was asked was under an injunction ordering it not to render such service.⁶⁰ In the same way legal processes duly served excuse a carrier from making delivery of goods which it has undertaken to carry; and a carrier may suspend delivery pending litigation involving the goods in question.⁶¹

⁵⁸ *Regina v. Sprague*, 63 J. P. 233 (Eng.), *LEADING ILLUSTRATIVE CASES*.

⁵⁹ *Decker v. Atchison T. & S. F. R. R. Co.*, 3 Okla. 553, 41 Pac. 610.

⁶⁰ *Sample v. Fresno F. & I. Co.*, 129 Cal. 222, 61 Pac. 1085.

⁶¹ *Skinner v. Chicago & R. I. R. R.*, 12 Iowa 191.

107. **Statutes expressly controlling service.**—A carrier will, of course, have an excuse for not accepting additional passengers who offer themselves after the vessel has its statutory complement.⁶² So, if it is illegal for a railroad to let its cars stand in the street, it can refuse to permit goods to be loaded upon that part of a spur which is laid through a street, without being liable for discrimination in so refusing.⁶³ Where an explicit ordinance of the Board of Health forbids the transportation of corpses except when accompanied by a person in charge having a transit permit containing specified information, a railroad may refuse transportation when all of this information is not filled in.⁶⁴ And where a revenue law directed that a stamp should be affixed to a telegram, it was held that a telegraph company might refuse to accept a telegram without a stamp.⁶⁵ The general principle underlying these cases is plain. The law will not drive one to disobey the law.

108. **Service of aid to criminals.**—It is equally obvious that those who conduct a public service are not bound by their general obligation to render service to criminals, where it would furnish them with an opportunity to commit crime. Thus it would seem that a pickpocket could be refused as a passenger.⁶⁶ A railroad should not be obliged to

⁶² *The Charles Nelson*, 149 Fed. 846.

⁶³ *Louisville & N. R. R. Co. v. Pittsburg & K. Coal Co.*, 111 Ky. Law Rep. 960.

⁶⁴ *Lake Erie & W. R. R. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395.

⁶⁵ *Western Union Telegraph Co. v. Waters*, 139 Ala. 652, 36 So. 773.

⁶⁶ *Coppin v. Braithwaite*, 8 Jurist 875 (Eng.).

carry one whose ostensible business might be to injure the line, one fleeing from justice, one going upon the train to assault a passenger, commit larceny or robbery, or any crime, as was said in one case where the issue was whether it was bound to carry persons who were traveling for the purpose of gambling.⁶⁷ A confederate officer going to rejoin his command could have been refused passage by a railroad within the union lines.⁶⁸ And a telegraph company could refuse to transmit a forged message knowing it to be such.⁶⁹ The explanation of these decisions is clear enough. One may always refuse to involve himself in a crime.

109. **Promotion of immoral business.**—There are several cases involving prostitution which test these principles. In none of them is the general problem so well worked out as in a recent case where a telephone company refused to give further service to a bawdy-house.⁷⁰ A court will not compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate—not aid—a public nuisance. Similarly a telephone company may not be compelled to keep an instrument in a pool room to be used as an adjunct to a gaming house.⁷¹ Nor is a telegraph company compelled

⁶⁷ *Thurston v. Union Pacific Ry. Co.*, 4 Dill. 321 (U. S.).

⁶⁸ *Turner v. North Carolina R. R. Co.*, 63 N. C. 522.

⁶⁹ *Western Union Tel. Co. v. Totten*, 141 Fed. 533.

⁷⁰ *Godwin v. Carolina Tel. & Tel. Co.*, 136 N. C. 258, 48 S. E. 636, **LEADING ILLUSTRATIVE CASES.**

⁷¹ *Cullen v. New York Tel. Co.*, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290.

to furnish service to a bucket shop run in defiance of law.⁷² And it seems that, where dealing in market futures is not made criminal although held against public policy, the telegraph company may refuse service.⁷³ It is also probable that reasonable suspicion of the impropriety of the business is sufficient to make out the excuse in these cases.

110. **Service involving special danger.**—For the protection of those being served, as well as for the protection of the public servant's own interests, a violent, unruly applicant, or one so drunken or insane as to endanger person or property, may be rejected at the outset, or ejected afterwards. Thus one passenger who is attacking another may be ejected by the carrier—principally of course for the protection of the others then receiving service.⁷⁴ But even if no guests should happen to be present, for his own protection the innkeeper may refuse to take in one who has attempted to break down his door.⁷⁵ If the danger or inconvenience to the carrier or its patrons seems reasonably imminent, although not absolutely certain, there would seem to be sufficient ground to justify the carrier in refusing to perform the service asked. The justification is made out if the carrier has reasonable cause to suppose, and did suppose, that the safety or convenience of other passengers would be endangered by the person in question; and it is not necessary to wait to see if the

⁷² *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637.

⁷³ *Gist v. Western Union Telegraph Co.*, 45 S. C. 344, 23 S. E. 143.

⁷⁴ *Louisville & N. R. R. Co. v. Logan*, 88 Ky. 232, 10 S. W. 655.

⁷⁵ *Goodenow v. Travis*, 3 Johns. 427 (N. Y.).

person believed with reason to be dangerous, is actually so.⁷⁶ On the same principles a carrier may refuse an armed man admission to its vehicle, the peculiar danger to other passengers being obvious enough.⁷⁷

111. Protection from diseased persons.—For the protection of all concerned with the service the right is obvious also to exclude from association with others those having a contagious disease.⁷⁸ Moreover, a person in such a critical condition that her physicians cannot answer for her life may not insist upon transportation, even if accompanied by an attendant.⁷⁹ Where a guest is taken ill at a hotel the proprietor, after notifying the sick guest to leave, has the right to remove such guest in a careful and becoming manner, and at an appropriate time to some hospital or other place of safety, provided the life of the guest be not imperiled thereby.⁸⁰ This reasoning was followed in a recent case where it was held that a sleeping car company might under proper conditions exclude passengers apparently suffering from contagious disease from its cars, to avoid the danger they might cause to other passengers.⁸¹ It has already been seen that the carrier owes the duty to take all reasonable steps to protect those in its charge from dangers threatening them. If the law imposes this duty upon the carrier, it should justify

⁷⁶ *Jencks v. Coleman*, 2 Sumn. 221 (U. S.).

⁷⁷ *Flint v. Norwich & N. Y. Transportation Co.*, 6 Blatch. 158 (U. S.).

⁷⁸ *Paddock v. Atchison T. & S. F. Ry. Co.*, 37 Fed. 841.

⁷⁹ *Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601.

⁸⁰ *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. 291.

⁸¹ *Pullman Co. v. Krauss*, 145 Ala. 395, 40 So. 398, LEADING ILLUSTRATIVE CASES.

it in any steps which it feels reasonably called upon to take to protect its passengers from what seems to be a danger to them.

112. Persons under physical disability.—The aged and crippled may not be refused service, although some special care must be taken of them. The right of passenger carriage is not confined to persons who are vigorous and sound, but is open to those ailing and infirm.⁸² Blind persons and paralyzed people, small children and helpless people, may not expect to journey as others travel.⁸³ Persons who might be refused if presenting themselves unaccompanied, may insist upon being carried when they do not ask special attention, being accompanied by attendants of their own, unless even with such attendants they would be an extraordinary care to the carrier.⁸⁴ But it should be added that, if persons who are apparently incapable are given to understand that they will be helped through, peculiar care must be exercised by those having them in charge to see that their safety is not imperiled, although service involving such peculiar liabilities need not have been undertaken.⁸⁵ Moreover, if one is stricken while upon a journey the carrier must care for him until he can be turned over to other aid, as emergencies create special obligations.

113. General conditions justifying suspension.—There are many situations in which it is justifiable

⁸² *Wabash Ry. Co. v. Mathew*, 199 U. S. 605, 26 Sup. Ct. 752.

⁸³ *Zachery v. Mobile & O. R. R. Co.*, 75 Miss. 746, 23 So. 434, **LEADING ILLUSTRATIVE CASES**.

⁸⁴ *Southern Ry. Company v. Mitchell*, 98 Tenn. 27, 40 S. W. 72.

⁸⁵ *Anderson v. Atlantic C. L. Co.*, 77 S. E. 402 (N. C.).

to suspend service in whole or in part. These will be discussed later in dealing with the obligation to have facilities at hand to carry through properly a particular service after it has been undertaken. But it is obvious that the same considerations will justify a refusal to accept new applications for service during the period, as when the company seeks to be excused for not completing in regular course the business already on hand. Without going far into the matter as to the various circumstances which may make suspension permissible, it is enough to point out here that when the management has done the best that could be expected of it under the conditions at the time, it has done all that the law requires. But in the absence of the existence of an exceptional cause, such as the act of God, the public enemy, unavoidable accident or unanticipated inrush of business, which will prevent the performance of its common-law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment.⁸⁶ It will be seen that these general considerations apply to service in general; and therein this general justification (impersonal in its application) differs from the particular excuse (personal in its character) which has just been under discussion.⁸⁷

114. Refusal to receive because of strike.—Since the carrier undertakes to carry, and to provide servants as well as vehicles for the purpose, it is

⁸⁶ This is virtually a quotation from *Knight v. Quincy, O. & K. C. R. R. Co.*, 120 Mo. App. 311.

⁸⁷ See also the various instances of justification enumerated in *Houston & T. C. R. R. Co. v. Mayes*, 201 U. S. 329, 26 Sup. Ct. 491.

bound to do so, and it is therefore remiss in the performance of its undertaking if for any reason it fails to provide sufficient equipment. The fact that it is prevented from doing so by a strike of its employees is, therefore, no defense to it.⁸⁸ The case would be otherwise where the strike is a sympathetic one with which the carrier is unable to cope, without failing in performance of its public duty. When, however, the carrier has provided sufficient vehicles and servants to carry, and is prevented from proceeding by the violence of a mob over which it has no control, it is excused from its duties for the time being.⁸⁹ And this will be so although by meeting the demands of the strikers the carrier could purchase peace. Mob violence thus furnishes an excuse for delaying service, the obligation to render service being relative—to do the best one can. And yet, as has been seen, if goods taken in charge are destroyed by a mob the carrier is liable absolutely by the peculiar law making it an insurer of all property entrusted to it for transportation.

115. Service disadvantageous to perform.—One must not be too nice in serving the public as a whole. Unkempt persons and those in unconventional dress must be taken, as well as loud people, and prize fighters.⁹⁰ Militia men or sailors in uniform may not be refused entertainment, nor may scabs or strike breakers be refused.⁹¹ It is no excuse here that such

⁸⁸ *People v. New York Central & H. R. R. Co.*, 28 Hun 543 (N. Y.), **LEADING ILLUSTRATIVE CASES.**

⁸⁹ *Hall v. Pennsylvania R. R. Co.*, 14 Phila. 414 (Pa.).

⁹⁰ *Regina v. Sprague*, 63 J. P. 233 (Eng.), **LEADING ILLUSTRATIVE CASES.**

⁹¹ *Atwater v. Sawyer*, 76 Me. 539.

service may hurt the business of the concern, or even may lead to actual damage. A carrier may not refuse to carry persons because of their color or race, whatever may be the prejudices current against them in the community.⁹² It must be admitted that this requirement may result in pecuniary loss. This is particularly true in the case of innkeeping; but the public duty is nevertheless imperative in this calling, as in all others. However, it would seem to be the plain right of the carrier, or indeed the innkeeper, to assign the different races to different accommodations, since the management of the business is left to the proprietor.⁹³

116. Business policies inconsistent with public employment.—Those who conduct a private business may adopt such policies as will produce the greatest profits; but those who profess a public employment must not do anything inconsistent with their public duty. Accordingly many policies for getting patrons away from others, or protecting an established custom from competition, which are legal enough in private business, must be held illegal in public business. Thus a carrier may not refuse to deal with those who will not deal with it exclusively, as one may in private business.⁹⁴ Likewise one gas company may not agree with another not to serve those already served by the other.⁹⁵ A railroad may not refuse to take, at the carload rate, car lots which for-

⁹² *Chicago & N. W. R. R. Co. v. Williams*, 55 Ill. 185, *LEADING ILLUSTRATIVE CASES*.

⁹³ *Younger v. Judah*, 111 Mo. App. 303, 19 S. W. 1109.

⁹⁴ *Chicago & A. R. R. Co. v. Suffern*, 129 Ill. 274.

⁹⁵ *State ex rel. v. Portland Nat. Gas & Oil Co.*, 153 Ind. 483, 53 N. E. 1089.

warders have assembled together from various shippers.⁹⁶ And a railroad may not carry coal, which it is selling from its own mines for itself, for less than its scheduled rate.⁹⁷

⁹⁶ *Interstate Com. Com. v. Delaware L. & W. Ry. Co.*, 220 U. S. 235, 31 Sup. Ct. 392.

⁹⁷ *New York, N. H. & H. R. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272.

CHAPTER XII.

PROVISION OF ADEQUATE FACILITIES.

117. **Basis of the duty.**—It has been seen that the provision of adequate facilities in the conduct of the business which has been undertaken is one of the fundamental obligations resting upon those who undertake a public service. Without the recognition of this duty to provide proper facilities for carrying through the undertaking professed, the general requirement of service would be idle. The modern law goes to the extent of insisting that wherever there is found an undertaking to perform a general service for the community, facilities for performing that service must be provided, although this really means an expansion of the service. It must be plain to anyone familiar with the progress of the law as to the conduct of public employment that it is becoming more searching. Doubtless, as those who conduct these businesses maintain, it will be wise to leave to those responsible for their management a reasonable discretion in every respect. But this does not mean that the law should not arrive at working standards of proper management with sufficient detail to be really effective.

118. **Proper equipment must be provided.**—Regard must be had to circumstances and conditions under which the service is being rendered, the character and extent of the service, its reasonable

and proper requirements, and the means and methods best suited to such service in common use.⁸⁸ In a diversified business, such as common carriage, special equipments of various sorts must often be provided. In the case of the railroads very different cars, of course, are requisite for the transfer of passengers and of freight. And although many kinds of freight may be transported in open cars with safety, more kinds require box cars. Where the business which is being done requires it, the cases now hold that the railroad must equip itself with refrigerator cars, ventilator cars, stock cars and tank cars.⁸⁹ These cases would seem to justify the generalization, that wherever the territory served by the railroad produces in sufficient quantities commodities which require special equipment for their proper shipment, such equipment should be provided. It should be added that the proprietors of the service are themselves responsible for the proper performance of the service they have professed. They must, therefore, see to it that they have proper equipment to render the service which they have undertaken. Thus, if a railroad bridge is built for a railroad company by reputable bridge builders, but is built so negligently that an accident results, nevertheless the railroad company itself is liable.¹ It may not shift its responsibilities upon the bridge builders. And so a railroad may not, by having its passengers carried in sleeping cars belonging to an independent

⁸⁸ *State ex rel. v. Atlantic C. L. Ry. Co.*, 53 Fla. 650, 44 So. 213.

⁸⁹ *State v. Cincinnati N. O. & T. P. R. R. Co.*, 47 Oh. St. 130, 23 N. E. 928.

¹ *Louisville, N. A. & C. R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284.

company, escape ultimate liability for the safety of the equipment thus provided.²

119. The expansion of present facilities.—In the case of the municipal service—such as waterworks, gas plants, electric plants, and telephone systems—there are sufficient authorities to the effect that such companies must, to speak in general, be prepared to extend their system throughout their district to meet the reasonable demands of the growing community.³ If this involves the acquisition of new sources of supply, or a laying of pipes in new streets, or extension of wires to other streets, or the construction of new exchanges,—all these new facilities must be provided to meet the expansion of the business within the community to the service of which the company has committed itself. A reasonable time to make such extensions after the demand has become apparent should be allowed.⁴ It has been well said that this obligation to expand is usually dependent upon the existence of a reasonable expectation that the consumption shall become within a reasonable time sufficient to warrant the necessary preliminary expenditure.⁵ This undertaking to serve a community should not lay the company open to outrageous demands in individual cases, but only to such service as the community considered as a whole may demand. And in the meantime the company

² *Pennsylvania Co. v. Roy*, 102 U. S. 451.

³ *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518.

⁴ *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. 257, LEADING ILLUSTRATIVE CASES.

⁵ *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

must use its existing plant to best advantage, doing the best for applicants that is possible under the circumstances.⁶

120. Equipment for expected business.—What the law requires of one engaged in public service is to furnish facilities sufficient for the usual course of his business, so far as by ordinary forethought he may anticipate it. Where a railroad has provided itself with more cars per mile of track than railroads operating in that territory usually have, and has more cars under contract for early delivery, its excuse is obvious in the absence of other evidence.⁷ Even after the need of more equipment becomes apparent it should be realized that it is a long time after orders for rolling stock are placed before it is delivered.⁸ There are limitations upon this rule that equipment must be provided to meet expected demands. It is not possible on the basis upon which street car lines are run to provide a seat for every passenger at the rush hours.⁹ Nor would it be wise to require a granger railroad to buy cars enough to handle the grain crop in the same week that it is started toward market.¹⁰ The law of public service does not ask outrageous things; a community should not expect a higher grade of service than it is willing to pay for.

121. No provision for expected business.—If the press of business might have been provided against

⁶ *Cumberland Tel. & Tel. Co. v. Kelly*, 160 Fed. 316, LEADING ILLUSTRATIVE CASES.

⁷ *St. Louis S. W. Ry. Co. v. Clay Ginn Co.*, 77 Ark. 357.

⁸ *Mauldin v. Seaboard Air Line Ry. Co.*, 73 S. C. 9, 52 S. E. 677.

⁹ *North Jersey St. Ry. Co. v. Jersey City*, 75 N. J. L. 349, 67 Atl. 1072.

¹⁰ *State ex rel. Crandall v. Chicago B. & Q. R. R.*, 72 Neb. 542, 101 N. W. 23, LEADING ILLUSTRATIVE CASES.

by reasonable diligence of the carrier, there is no such excuse for its failure to provide adequate facilities.¹¹ The sufficiency of accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation.¹² If, then, the abnormal demand should have been foreseen by a reasonable management, it is in default unless it has made every effort to meet the emergency. Thus in the conduct of passenger business, when it is known that some exhibition or other event will bring together a large number of people, the transportation lines should make seasonable allotment of facilities to meet the extraordinary demand at this point.¹³ In a late case it was held that a railroad company which had obligated itself to furnish refrigerator cars to transport garden truck to market could not escape liability for breach of that duty upon the ground that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted—knowledge of which the railroad company either had, or had the means of obtaining.¹⁴

122. Establishment of railroad stations.—It is everywhere agreed that the state may by statute establish railroad stations wherever the public need

¹¹ *Ballentine v. No. Missouri R. R. Co.*, 40 Mo. 491, *LEADING ILLUSTRATIVE CASES*.

¹² *Montana W. & S. Ry. Co. v. Morley*, 198 Fed. 991.

¹³ *Chicago & A. R. R. Co. v. Dumser*, 161 Ill. 190, 43 N. E. 698.

¹⁴ *Yazoo & M. V. R. R. Co. v. Blum Co.*, 88 Miss. 180, 40 So. 748.

requires them.¹⁵ The more usual method of exercising the legislative power in this regard is by delegation of the determination of the necessity for the establishment of new stations, or the propriety of changing existing stations, to a regulating commission.¹⁶ Of the constitutionality of such legislation and the consequent force of such orders there can be no doubt. But many courts still believe that, without legislative interposition in some form, the railroad companies are free to do as they please in these respects. There are, however, as even these courts realize, principles of law governing this matter so clear that even legislation will be set aside if outrageous. When a station was ordered in a place where it was obvious there was practically no business whatsoever, nor any prospect of any being developed, the court set the statute aside.¹⁷ But it is plainly within the regulating power over public services for the state commission to order the establishment of a station where a railroad is running through a thickly settled region for many miles without making a stop, especially if the residents of such territory have no other adequate facilities.¹⁸

123. Power to order stations.—According to the conservative view relating to the establishment of stations the courts will not presume to order the opening of stations, the decision as to the number of stations requisite being left to the discretion of

¹⁵ *Mayor v. Norwich & W. R. R. Co.*, 109 Mass. 103.

¹⁶ *Railroad Commissioners v. Portland & O. C. R. Co.*, 63 Me. 269.

¹⁷ *Louisiana & A. Ry. Co. v. State*, 91 Ark. 358, 121 S. W. 284.

¹⁸ *Minneapolis, St. P. & S. S. M. R. R. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905.

the directors of the company.¹⁹ This was the attitude taken in the leading case in the Supreme Court of the United States where the court refused to order the reopening of a station which had been closed in the face of a flourishing community, and moved to a point several miles farther on.²⁰ On the other hand, in the leading case in Illinois, the court without aid of special legislation itself ordered the opening of a station for a community of 1,800 inhabitants through which a railroad was running without stopping.²¹ In a more extreme case still the court has recently ordered two railroads to join in the construction of a union station.²²

124. Arrangements for delivering freight.—All the law discussed in this topic is as applicable to freight stations as to passenger stations. The question is whether the existing freight stations are so situated as to meet the reasonable demands of the shippers of the district.²³ There are exceptional businesses where the commercial necessity for private switches is recognized by the common law to be overruling. This is peculiarly true of those who ship or receive freight in bulk. Thus private switches should be permitted at grain elevators, coal tipples, ore smelters and oil tanks, provided the shipments from them are of reasonable size.²⁴ And the same is true of those who are shippers and receivers

¹⁹ *Jacquelin v. Erie R. R. Co.*, 69 N. J. Eq. 432, 61 Atl. 18.

²⁰ *Northern Pacific Railroad v. Washington*, 142 U. S. 492, 12 Sup. Ct. 283.

²¹ *People v. Chicago & A. R. R. Co.*, 130 Ill. 175, 22 N. E. 857.

²² *Concord & M. R. R. v. Boston & M. R. R.*, 67 N. H. 464, 41 Atl. 263,
LEADING ILLUSTRATIVE CASES.

²³ *People v. Delaware & H. C. Co.*, 52 N. Y. Supp. 850.

²⁴ *Chicago & N. W. R. R. v. People*, 56 Ill. 365.

in considerable quantities of such freight as it would be actually impracticable or peculiarly disadvantageous to transport by teams over the roads.²⁵ A railroad may have elaborate terminals in great cities and only freight sidings at small towns, the question being in all cases whether adequate provision is being made for handling existing business.²⁶

125. **Priorities given in emergencies.**—In time of stress when the company involved has not sufficient facilities to meet all demands made upon it for service, it is not enough to say simply that the company is excused from not meeting particular demands upon it. Being in public service still, it must always discharge its public duties, so far as it is able, handling the business demanding its attention, with proper regard to the exigencies of the whole situation. To give one example, it is sufficiently obvious that such service as the company itself needs, in order to maintain its service for the benefit of all concerned, has precedence over everything. Thus a railroad may give coal cars bringing its own coal supply to any point where the supply is low precedence over other shipments.²⁷ In case of war, troops and their equipment will be given priority over all other business.²⁸ And in case of public calamity, as the Chicago fire, relief trains may be given precedence over all others.²⁹ Likewise, a water company

²⁵ *Railroad Commission v. Kansas City So. Ry. Co.*, 111 La. 133, 35 So. 487.

²⁶ *Michie v. New York, N. H. & H. R. R. Co.*, 151 Fed. 694.

²⁷ *Louisville & N. R. R. Co. v. Queen City Coal Co.*, 13 Ky. Law Rep. 832.

²⁸ *Illinois Central Ry. Co. v. Ashmead*, 58 Ill. 487.

²⁹ *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6.

is temporarily excused for failing to give its household customers a proper supply when the fire plugs are open in that district to extinguish a fire, if the supply of water for householders was, in all ordinary circumstances, adequate.³⁰

126. Ordinary course of performing service.—There are general rules of precedence governing service, when no particular emergency appears. Passenger business has priority over freight service, just as the safety of passengers always outweighs the protection of goods.³¹ As between two offerings of freight, perishable freight should be sent ahead of other freight.³² Live stock and perishable fruits constitute the plainest examples of the sort of things for which a special equipment and a fast train schedule are imperatively demanded. Conversely hay and sand, not being perishable, may be delayed in transit in time of stress in favor of other goods.³³ Even as between the same commodities there may be priorities to be observed in emergencies. Goods of special classes, which have a brief market, may be preferred to staple commodities, which are always salable. If the carrier forwards first those goods which are most necessary to the public, it can hardly be said that the carrier is not performing its public duty. But, on the other hand, it will be a safe generalization that no preference is justifiable between goods of the same nature, unless some such public interest appears. Not even a southern carrier may

³⁰ *Campbell v. East London Waterworks*, 26 L. T. (N. S.) 475 (Eng.).

³¹ *Farnsworth v. Groot*, 6 Cow. 698 (N. Y.).

³² *Marshall v. New York C. R. R. Co.*, 45 Barb. 502 (N. Y.).

³³ *Southern Ry. Co. v. Atlanta Sand & Supply Co.*, 135 Ga. 35, 68 S. E. 807.

give King Cotton preference over lumber, as a recent case holds.³⁴

127. **Assignment of facilities.**—As the provision of facilities is primarily a question of management, the decision as to the assigning of accommodations should be left to those providing the service, unless they act outrageously. There is fundamental truth in what a court once said, justifying a ferryman in assigning passengers to their seats—the ferryman must be the captain.³⁵ Upon these principles it was held in a late case that where several street cars were standing at a depot waiting for passengers from an incoming train, a passenger had no right to complain because he was directed to take passage in one car, instead of another.³⁶ It is equally well established that the innkeeper may, even after a room has once been assigned, direct the guest to change to another room, whether it is agreeable to him or not.³⁷ However, it has been held that if a passenger has once settled himself in a seat the conductor should not disturb him merely for his own personal convenience.³⁸ Where there are more applicants for service in the same general class than there are facilities available, the traditional rule has been to serve customers in the order of their application. Thus the normal rule as to telegrams is that they shall be forwarded in order of receipt.³⁹ And so a steamship

³⁴ *Ocean S. S. Co. v. Savannah L. W. & S. Co.*, 131 Ga. 831, 63 S. E. 577.

³⁵ *Claypool v. McAllister*, 20 Ill. 504.

³⁶ *Dobbins v. Little Rock Ry. & El. Co.*, 79 Ark. 85, 95 S. W. 794.

³⁷ *Doyle v. Walker*, 26 Upp. Can. Q. B. 502 (Canada).

³⁸ *McLain v. St. Louis Ry. Co.*, 13 Mo. App. 733, 11 S. W. 835.

³⁹ *Western Union Telegraph Co. v. Ward*, 23 Ind. 377.

company should assign berths to passengers in the order of their application.⁴⁰

128. **Rules for car distribution.**—In the case of railroad service, it is obviously impossible to regulate the order of accepting goods according to the time of offers for shipment over the whole line. Reasonable treatment must be accorded each station, and each given its fair share of the available supply.⁴¹ While it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still it can be approximated by saying that the means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire lines of the road as to afford a reasonable amount of accommodation for all.⁴² When it becomes a question of the assignment of facilities to applicants in the same locality, it is now realized that fairness to all concerned requires that there should be careful apportionment of the facilities available.⁴³ What is the fair share of each shipper is a matter with which the courts are still wrestling at present; but some things are clear enough. Rules established for car distribution between carrier and shippers based upon their normal requirements will not be set aside as unreasonable.⁴⁴

⁴⁰ *Patterson v. Old Dominion Steamship Co.*, 140 N. C. 412, 53 S. E. 224.

⁴¹ *Ballentine v. No. Missouri R. R.*, 40 Mo. 491, LEADING ILLUSTRATIVE CASES.

⁴² *Ayres v. Chicago & N. W. R. R.*, 71 Wis. 372, 37 N. W. 432.

⁴³ *State ex rel. Crandall v. Chicago B. & Q. R. R. Co.*, 72 Neb. 452, 101 N. W. 23, LEADING ILLUSTRATIVE CASES.

⁴⁴ *United States v. West Va. No. Ry. Co.*, 125 Fed. 252.

CHAPTER XIII.

DETERMINATION OF REASONABLE CHARGES.

129. Principles for determining reasonableness.

—A rate which is reasonable from the point of view of the customer served may not be reasonable to the company serving. The interest of the company is entirely directed toward framing a schedule of rates which as a whole shall produce a certain return. So long as the requisite return is realized, it is immaterial to it what the proportion of contribution of each individual customer is to the whole amount. On the other hand, the customer is interested in the individual rate charged to him, and in that alone. So long as his rate is a fair one it is immaterial to him that the whole schedule is so arranged as to yield a great profit to the company. It is only within a comparatively few years that there has been any attempt to work out this problem, but great progress has been made of late in the development of the law governing rate making. It may now be determined with sufficient certainty whether a schedule of rates taken as a whole is producing too much. And one may even give a judgment upon the reasonableness of the particular rates composing that total. It might be added that the public service commissions having power to fix rates have gone much farther in developing this science of rate making than the courts have found it necessary to go in

revising the system of rates established by public authority.

130. Reasonableness of the schedule as a whole.

—The reasonableness of the schedule as a whole depends upon whether it yields a fair return upon the capital invested by the proprietors of the service. This is largely a mathematical question governed by principles which may now be said to be well recognized.⁴⁵ The public service company is entitled first of all to pay all its expenses of operation. These include not only the actual disbursements for operation in each year, but also certain annual charges which must be paid before any real profit is realized. Moreover, the company is entitled to gain a fair profit upon its reasonable capitalization. What constitutes a reasonable capitalization, and what is a fair return, are matters not altogether clear according to the authorities as yet. But, generally speaking, it may be said that by the present policy a total return will be allowed in normal cases sufficient to yield the company a net profit above proper charges equal to that which would be realized from any other business where the capital and the risk were the same.⁴⁶

131. Theories as to proper capitalization.—In order to decide upon what principles the amount of capital devoted to a public service, and therefore entitled to a return, is to be estimated, it is important to note the various theories which have been brought forward for determining what amount is proper.

⁴⁵ *Missouri K. & T. R. R. Co. v. Love*, 177 Fed. 493.

⁴⁶ *Coal & Coke R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

Thus the outstanding capitalization is by a few still regarded as sacred,⁴⁷ while at the other extreme are those who refer everything to what might be shown to be the bare cost of substantial reproduction at the present moment.⁴⁸ But to most persons both of these standards seem essentially unfair, either to the company concerned or to the public served. And the real controversy it is submitted is between the two remaining theories, the original cost of the property in question to its owners,⁴⁹ or the fair value of the property at the present time.⁵⁰ It will be seen that, although these amounts may sometimes nearly approximate each other, there is such an inherent difference between these cases that one or the other must ultimately be adopted in a particular case.

132. Fair percentage of return.—It is now generally conceded that a proper return upon the true value of the property devoted to the public use ought in all normal cases to be protected. If rates are so reduced by public authority as to leave no such adequate return, it is now said that the owners are in effect deprived of their property. It is not only a due consideration for the rights of others who have already invested their money in public services, but also an enlightened selfishness with a view to the future which dictates the present policy that a reasonable return upon the value of the property de-

⁴⁷ *Consolidated Gas Co. v. New York*, 157 Fed. 849.

⁴⁸ *Steenerson v. Gt. Northern Ry.*, 69 Minn. 353, 72 N. W. 713.

⁴⁹ *Brymer v. Butler Water Co.*, 179 Pa. St. 231, 36 Atl. 249, LEADING ILLUSTRATIVE CASES.

⁵⁰ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, LEADING ILLUSTRATIVE CASES.

voted to the public service shall be protected by the Constitution.⁵¹ In determining the measure of return upon property devoted to public use, regard should be had to the character of the business, the locality and the risk, whether the return will be uniform and secure; whether the patronage is steady or fluctuating and quickly responsive to financial and commercial changes, interest rates—legal and contractual—and the rates customarily sought and required in like investments in the locality; if a railroad, the character of the traffic, whether largely of a kind dependent upon uncertain conditions or so diversified that causes affecting part will not greatly affect the whole.⁵²

133. **What are operating costs.**—A public service corporation should, therefore, be allowed to take from its public enough to give it a fair return upon reasonable capitalization over and above all operating expenses and annual charges. It is to a certain extent plain enough what are properly chargeable operating expenses. Wages and salaries, materials and supplies—these are allowed as matters of course unless there is a suspicion that they are being inflated.⁵³ Rentals and insurance assessments and taxes are annual costs and must be taken care of out of present rates. No one will deny that current repairs should come out of current earnings; and everyone will concede that all new construction should be provided for by additional capital. There

⁵¹ *Stanislaus v. San Joaquin, etc., C. & Irr. Co.*, 192 U. S. 201, 24 Sup. Ct. 241.

⁵² *Simpson v. Shepard*, 33 Sup. Ct. 729, LEADING ILLUSTRATIVE CASES.

⁵³ *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400.

remains the debatable ground of improvements and betterments.⁵⁴ It is possible to prevent the company from allowing for anything of this sort out of annual earnings; but the more advantageous course for all concerned would seem to be to sanction any policy in this regard which any company may adopt, provided it is within the bounds of reason. Here as elsewhere it is a matter for the company to work out in the first instance for itself.

134. Annual charges for amortization.—There are other annual charges to be taken into consideration. In general, an annual charge for depreciation in value of the plant by use is proper. This is again a matter which cannot be decided by general rules as to a standard percentage, but is a matter of careful investigation into the character of each particular business. It is now seen that the question of depreciation is too difficult for offhand estimation. The courts have as yet usually contented themselves with saying that some fair per cent should be allowed.⁵⁵ A well conducted company may, indeed, see to it that provision is made for the renewal of equipment which is obviously deteriorating, but few indeed are making under present conditions provision against the slow but sure depreciation of the plant as a whole. Now that it is becoming recognized in the decisions that such allowance is a proper operating cost, more attention will doubtless be paid to this vital matter. Sinking funds, however, are hardly

⁵⁴ *Illinois C. R. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 400, LEADING ILLUSTRATIVE CASES.

⁵⁵ *Long Branch Comm. v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474.

permissible in public service.⁵⁶ Those who raise capital to build plants put the property at the disposal of the public for a return upon that capital; they cannot expect a return of that capital disguised as a sinking fund.

135. **Theories as to rate making.**—Various theories as to the making of particular rates are still in vogue. Apparently the more lawyerlike persons would base all particular rates upon the cost of the service to the company, while the more businesslike persons would make the universal test the value of the service to the patron. Opportunists would leave the making of rates to competition, while paternalists would attempt to equalize the advantage to customers in making rates. However various they may seem, these theories as to the proper basis of rate making align themselves into two opposing groups. First: there is the legal which gives chief place to the cost of service.⁵⁷ Second: there is the economic, which makes the value of the service the basis.⁵⁸ There used to be these two schools as to the whole schedule, one maintaining that the total receipts which a public service company might take were limited by law, the other asserting that the corporations were entitled to what they could get out of the public. This matter of the whole schedule has so long been settled against economic freedom and in favor of legal restriction, that no one would reopen

⁵⁶ *Houston & T. C. R. R. Co. v. Storey*, 149 Fed. 499, LEADING ILLUSTRATIVE CASES.

⁵⁷ *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, LEADING ILLUSTRATIVE CASES.

⁵⁸ *Interstate Com. Com. v. Chicago Gt. W. Ry. Co.*, 141 Fed. 1003.

the controversy with any hope of success. The history of the basis for determining the separate rates of the whole schedule must follow the same course.

136. Proper proportion of total costs.—The total amount of gross receipts which a public service company is justified in taking from its whole business has been briefly discussed. These are in brief all annual expenditures, including an allowance for upkeep, and in addition the fair capital charges for the year, arrived at by determining what would be in the particular case a reasonable return upon proper capitalization. The fairest way to all concerned to determine the price for any particular service would seem to be to apportion ratably the total disbursements of every sort to the various items of business, and so arrive at proportionate rates.⁵⁹ Theoretically, certainly, any other method is less just to all concerned. In determining thus what is a reasonable rate for a service to be rendered, it is not proper to take the plant as existing and as maintained, and to regard as the whole cost of any subsequent service merely the increased expense necessary to add to its business the service in question.⁶⁰ The cost of each service ought to include its fair share of the interest on investment and of the general expense; and it is necessary, therefore, to consider what rules there may be devised for proper apportionment.

137. The unit of service.—The computations described in this chapter may be carried with advan-

⁵⁹ *Pennsylvania R. R. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, LEADING ILLUSTRATIVE CASES.

⁶⁰ See *Atchison, T. & S. F. Ry. Co. v. United States*, 203 Fed. 56.

tage one step farther, to the determination of the average cost per unit of service. Thus of any given gas company it may be said that it is entitled to take as gross receipts from its whole business a certain sum, determined by adding together its operating expenses, including therewith all proper maintenance charges, and its fixed charges. Then if the probable sales, judged by its actual sales, amount to approximately certain thousands of cubic feet, its proper average price per cubic foot may be found. In testing freight rates, the most difficult problem of all, this standard is the ton-mile cost. If the sum of the whole amount of freight carried is one hundred thousand ton miles, and the gross revenue required from freight be two thousand dollars, the average rate of freight will be two cents per ton mile. If there were no other factors in the problem, therefore, a fair proportionate rate would be the ton-mile average charge.⁶¹ Owing, however, to other factors which cause a difference between commodities with respect to the fair charge for carrying them, a uniform ton-mile rate applied to all cases would not result in reasonable rates.⁶²

138. **The rate as an entirety.**—The idea of the law has always been that the rate was an entire thing. For instance, as the whole freight is an indivisible unit, it is obvious that without some new arrangement between the parties the carrier will not be entitled to any freight whatever for goods not de-

⁶¹ *Atlantic C. L. Ry. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. 108, **LEADING ILLUSTRATIVE CASES**.

⁶² *Tift v. Southern Ry.*, 138 Fed. 752.

livered at the destination.⁶³ Where, therefore, the carriage is interrupted when partly completed, since there is no delivery at the destination, the freight is not due; and since freight is an entirety there is nothing which can properly be recovered, in the absence of a new agreement.⁶⁴ Where delivery is made of part of the goods only, it is not possible to divide the shipment into separate units, and recover freight for as many such units as are delivered.⁶⁵ On the other hand, if the goods arrive in specie, but have been damaged without fault of the carrier, entire freight is due. Even if they arrive damaged by fault of the carrier, so long as they are still in specie, the owner must receive them and rely upon a cross action for damages.

⁶³ *Cargo ex Argos*, L. R. 5 P. C. 134 (Eng.).

⁶⁴ *Braithwaite v. Power*, 1 N. D. 455, 48 N. W. 354.

⁶⁵ *Western Transp. Co. v. Hoyt*, 69 N. Y. 230.

CHAPTER XIV.

PREVENTION OF DISCRIMINATION.

139. **The development of the rule.**—The rule against discrimination is the latest development of prime importance in the law governing public service. It must be plain to all that there has been distinct evolution in the law governing public employment during the last twenty-five years. A comparatively few years ago it was held that if a public service company served all at reasonable rates it performed its obligation. So long as one received service at a rate which was reasonable in itself, it used to be maintained that he had no ground for complaint even if another similarly circumstanced was getting service at a lower rate. But it was said that if others were paying a lower rate than the complaining party this would be persuasive evidence to show that he was being charged an unreasonable rate. It is only within this last generation, however, that it has been appreciated that any discrimination is truly inconsistent with public duty. Indeed, it was bitter experience that forced the establishment of this law rather than any process of logical deduction. But nowadays it is stated as a matter of course that the duty owed to all alike involves the obligation to treat all alike.⁶⁶

⁶⁶ *Messenger v. Penn. R. Co.*, 8 Vroom 531 (N. J. L.), LEADING ILLUSTRATIVE CASES.

140. What constitutes illegal discrimination.—

Not only are the outright discounts and the bold rebates of the earlier time illegal today, but any device by which the charge to a shipper is made less than the schedule rate is now held discrimination. Thus free cartage for the collection and delivery of freight for certain shippers only, is an illegal rebate.⁶⁷ And the allowance to certain shippers of a certain sum for the use of their private sidings, is another case of illegal reduction.⁶⁸ As such obvious devices have thus become too dangerous, more elaborate schemes have developed for getting an advantage in rates. Many large concerns have organized, often, as a separate concern, an industrial railway from their premises to the trunk line. And posing as a connecting carrier they attempt to obtain from the trunk line a division of the rate to market.⁶⁹ Another late scheme is the organization of a dummy transportation company by a manufacturing company to carry its products to market, getting as payment not only the rental of their special cars at extraordinary high rate, but a virtual commission for furnishing the business.⁷⁰

141. Adherence to the scheduled rate.—The strict provisions against rebating in the recent legislation are based upon an ingenious and apparently effective plan. A schedule of rates prepared by the railroad must be filed with the commission, and duly published as required. When this has been done,

⁶⁷ *American Sugar Rfg. Co. v. Delaware L. & W. R. R.*, 200 Fed. 652.

⁶⁸ *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558.

⁶⁹ *United States v. Atchison, T. & S. F. R. R. Co.*, 142 Fed. 176.

⁷⁰ *United States v. Milwaukee Refrig. Transit Co.*, 145 Fed. 1007.

the rate so scheduled may not be changed by the railroad without the filing and sufficient publication of a new rate. The doctrine is carried to such an extent that even if a shipper is at first charged a lower rate quoted him by a freight agent, he can be compelled to pay the difference between this and the schedule rate.⁷¹ If the rate so published is unreasonable in itself or otherwise disproportionate, nevertheless the shipper may not accept nor the railroad grant a departure from it. The shipper's remedy is a complaint to the commission, which will result, if successful, in a reduction in the future and in damages for past unfair exactions. It follows that not only are rebates to favored individuals, and even special rates for good reasons, if they have not been publicly offered, made illegal, but it is also criminal for railroads or shippers to receive or give less than the published rates, even though both parties agree that the published rates are unreasonable and discriminatory.⁷²

142. **Special concessions to large customers.**—It has not been uncommon for the managers of public service corporations to make lower proportionate rates to larger than to smaller customers. In the older times this was practiced openly as there was then no recognized rule against discrimination as such. But even in these later days it is often attempted to defend this practice on principle.⁷³ For

⁷¹ *Texas & P. R. R. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628.

⁷² *Goodridge v. Union Pacific R. R. Co.*, 37 Fed. 182, **LEADING ILLUSTRATIVE CASES.**

⁷³ *Silkman v. Water Commissioners*, 152 N. Y. 327, 46 N. E. 612, **LEADING ILLUSTRATIVE CASES.**

this policy is of great importance to the managers of public services who may often see the opportunity to get large amounts of valuable business, highly profitable in the aggregate even at lower proportionate rates, if they can still maintain higher proportionate rates upon the regular business which they get from smaller customers who are not in a position to dictate their terms. That this policy may often be advantageous in public business, as it is in private business, may be admitted, but it has already been seen that public duty may conflict with business policies. If, therefore, these concessions to larger shippers are in conflict with the public duty which the common carrier owes to smaller shippers, they must be held illegal as unjust discriminations.⁷⁴ This will be the clearer when it is shown that the favoring of such large shippers will give them such commercial advantages that they may crush out their small competitors in the common markets. The prevalent rule forbidding the granting of special reductions to larger shippers, as such, on the ground that they furnish a greater aggregate of business to the common carrier, seems, therefore, a necessary part of the law forbidding all personal discrimination.

143. Lower rates to exclusive customers.—Undoubtedly there is a commercial advantage in being able to adopt the policy of promoting exclusive arrangements with desirable customers, by offering reductions. The essential illegality of this policy appears most plainly, as has been seen in other connections, when there is an outright refusal to serve

⁷⁴ *Scofield v. Lake S. & M. S. R. R. Co.*, 43 Ohio St. 571, 3 N. E. 907.

those who deal with a rival.⁷⁵ A railroad may not refuse to take freight from a shipper who formerly shipped by it exclusively, but has now made arrangements to ship part of his freight by another line. If the public service company may not refuse to serve for the promotion of its own business interests, no more may it discriminate to obtain the advantages which may accrue to it if it may make lower rates to those who deal exclusively with it; but this policy would still prevail in making rates in competitive business doubtless, as it once did, were it not for the modern recognition of its essential illegality.⁷⁶ That such a policy may be advantageous to the company which employs it may be granted, but it has already been seen that those who conduct a public employment must forego many methods of getting business and holding it which are permissible in private affairs.

144. Service in more convenient units.—The most obvious application of the principles under discussion is the relatively lower rate almost universally quoted for carload lots as compared with less than carload. Substantial reasons exist for making the rate lower per barrel in carload lots than in less than carload quantities.⁷⁷ The cost of service is very considerably less in the case of car shipments. Altogether the economies of handling freight in carload lots are apparent. A rate per 100 pounds in less than carload lots may well be twice the rate

⁷⁵ *Menacho v. Ward*, 27 Fed. 529.

⁷⁶ *Hays v. Pennsylvania Co.*, 12 Fed. 309, *LEADING ILLUSTRATIVE CASES*.

⁷⁷ *New York T. & M. R. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

upon carload lots and not be unreasonable. Furthermore, shipments in bulk, as of oil in tank cars, are much cheaper to handle than in carloads of barrels; and a correspondingly lower rate may be given. But, as it is the business of the railroad to see that none of its patrons are put to disadvantage, a railroad failing to supply tank cars for those who own none must charge a barrel shipper the bulk rate only.⁷⁸

145. **Allowances made for facilities.**—It was formerly not open to question that where the customer furnished part of the facilities for his services a special rate could be charged him. Thus where a coal dealer furnished a wharf for his shipments an arbitrary reduction on his rates passed muster some years ago.⁷⁹ With the rigorous enforcement of the law against all discrimination in late years, such arrangements as have been just described are being condemned, if not as virtual discrimination, at least as a cover for discrimination. At all events, the whole facts will be gone into to discover whether too advantageous terms are being obtained. Thus in a recent case it was discovered that a car company was getting so much for the use of its cars that the reduction was being made the basis for reduced rates to those who shipped in those cars. And in another recent case not charging certain shippers demurrage for cars, upon what apparently was a private siding, while others paid demurrage in regular yards, was held to constitute discrimination. However, the

⁷⁸ *State v. Cincinnati N. O. & T. P. R. R. Co.*, 47 Ohio St. 130, 23 N. E. 928.

⁷⁹ *Root v. Long Island R. R.*, 114 N. Y. 300, 21 N. E. 403, LEADING ILLUSTRATIVE CASES.

railroads are still allowed to make arrangements with those customers furnishing their own facilities. Those who get allowances which are not scheduled will, however, fall foul of the modern statutes against discriminations, even if the allowances made are proper enough in themselves, since the legality of every charge depends upon the schedule published.⁸⁰

146. Difference in rate between freight classes.—It has been pointed out that there are great differences between the rates payable for transportation for the same distances upon goods in different classes. There is no fixed percentage for fixing the differentiation even of the six classes usually established; still less is there any definite rule for the differences to be made between commodities with extra class rating. But it is matter of common knowledge that there are great differences between rates payable by the different classes, the highest class usually paying for the same transportation many times what is paid by the lowest class. All that can be said in general is that the principles as to rate making apply here as elsewhere, and that the burden must be thrown upon the various classes without outrageous disproportion.⁸¹ The principles governing this matter have already been given. If the charge is excessive as compared with the charges of the same corporation for other commodities of like bulk and weight, value and risk, it would seem to be improper. That such comparisons are generally re-

⁸⁰ *Chicago & A. R. R. v. U. S.*, 156 Fed. 558.

⁸¹ *Cincinnati H. & D. R. R. Co. v. Interstate Com. Com.*, 206 U. S. 142, 27 Sup. Ct. 648.

sorted to is proof enough that the rule against disproportion is generally observed.⁸²

147. **Unjust rates between localities.**—At common law the public servant deals with the individual; except under a statute a community as such cannot complain of a discrimination against its inhabitants. Thus at common law it is the shipper who complains of discrimination. Whatever may be the present law as to the right of a customer in one locality to complain that his rates are disproportionately high as compared with those charged other customers of the company in other localities, it is certain that such discrimination is in itself evidence that the higher charge is an unreasonable one. Thus, whenever a rate between two points is attacked by an individual shipper as unreasonable in itself, as evidence in support of the complaint he may show that rates are lower for a similar haul between other points. Under modern legislation, however, this rate complained of may be so outrageously disproportionate as to constitute a violation of statutory provisions;⁸³ but if a rational defense can be made for the higher rate the courts have been inclined to permit it to stand. Thus under the federal legislation forbidding different charges unless the circumstances were dissimilar, competition existing between two points was held to justify a lower rate than that maintained between intermediate points where there was no competition.⁸⁴

⁸² *Interstate Com. Com. v. Chicago Gt. W. R. R.*, 209 U. S. 108, 28 Sup. Ct. 852.

⁸³ *Interstate Com. Com. v. Louisville & N. R. R.*, 118 Fed. 613.

⁸⁴ *Texas & P. R. R. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666.

148. Relative discrimination inconsistent with public duty.—It is submitted, therefore, that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. In the same way to-day, very probably there is no well recognized law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be, although it seems to be agreed that these palpable differences may of themselves be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion, as such, may eventually be recognized, despite the fact that it might interfere with the business policies of the public companies even more than the present rule against outright discrimination has done. For it seems plain that the same principles which forbid any differences when the conditions are the same, should prohibit disproportionate differences when the conditions are different. A charge for any particular service which is based upon the outlay caused is undeniably in accord with sound reason and policy.

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LAW OF MUNICIPAL CORPORATIONS

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CHAPTER I.

DEFINITION, EVOLUTION, CREATION, DISSOLUTION, ELECTION.

1. **Definition.**—The municipal corporation is a perfect public corporation, established under and by virtue of a sovereign act of legislation, uniting the people and land within a prescribed boundary into a body corporate and politic for the purposes of local and self-government, and invested with the powers necessary therefor. It is perfect as contradistinguished from the imperfect quasi-corporation, the county, district, or township, loosely organized under general law into a governmental agency for local administration. The municipal corporation is duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town, or district incorporated, by proper legislation and administration. Its object is public, though incidents connected with it may be of private nature, and

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so far forth it is subject to the rules of liability controlling private corporations in the ownership of property, while the quasi-public corporation is of a private nature and object, with incidents only that are public.¹

2. **Same subject—Establishment and nature.**—It is established under law; that is, it may be created by special charter enacted by the general assembly, without popular expression or action from the inhabitants of the territory; indeed, municipalities have been incorporated in direct antagonism to the expressed wish of the people. Or it may be voluntarily organized by the residents of a specified territory under general incorporation laws, enacted for such purpose, and authorizing the erection of a municipality by such means. When fully incorporated, both are equally perfect public corporations.

The incorporation of a municipality is a sovereign act of legislation, because in this country no other governmental power may create such a corporation. The power may not be delegated to any inferior body. The Federal Congress or the legislatures of the states alone possess this inherent creative power. The municipal corporation unites the people and the land, for neither people or land alone can constitute a municipality. Like a home, it requires a union of both elements—the land to give it body, and men to give it spirit and life. It has a prescribed boundary, because the limits of the municipality must be fixed and definite, that its territorial jurisdiction may not be uncertain or doubtful.

¹ *McKim v. Odom*, 3 Bland's Ch. 407 (Md.), *LEADING ILLUSTRATIVE CASES*.

The body is corporate and politic, because it is authorized and organized as an agency of the state for public uses and the public good.²

It is local, because, unlike the ancient cities, its powers and franchises are to be confined to its territorial limits, or lands immediately contiguous which are sometimes included for police and sanitary purposes.

It is for self-government, because the idea of foreign domination and exclusion of the people of a city or town from the administration of its internal affairs is repugnant to the fundamental conception of a municipality and the genius of American institutions. "Municipium" means a free town, and "municeps" a free citizen thereof, as those ideas were conceived in the Roman Empire.

A city not governed by its own laws and ordinances in its domestic concerns is not a municipality, either by history or etymology. It must have powers, or it cannot be a government—powers sufficient to authorize it to make its own laws and enforce them.

3. Creation.—The creation of municipal corporations within the limits of a state is the appropriate and exclusive function of the legislative power of that state, as explained above.

All governmental power of the state in our country inheres in the people of the state. They organize their government by a constitution, wherein they confer all legislative power upon the legislative department. The granting of any right, power, or franchise pertaining to public matters is obviously a func-

² *People v. Ingersoll*, 56 N. Y. 1, LEADING ILLUSTRATIVE CASES.

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tion of legislation, and cannot be within the province of the executive or judicial departments. A municipal corporation requires this grant of governmental authority as the essential condition of its being. The legislature has a discretion, uncontrolled by any constitutional limitations, to decide when a given locality has a sufficient number of inhabitants to entitle it to be incorporated as a city.³

The power to create a municipal corporation being vested in the legislature, implies the power to create it with such limitations as that body may see fit to impose, and to impose the same at any stage of the municipality's existence.⁴

Whether this power may be delegated by the legislature to either of the other coördinate departments of government, or the chief officers thereof, or any inferior officer or board therein, is a subject of apparent conflict in the decisions of the courts. But if the legislature authorize the formation of corporations by general law, it may empower courts or boards to do ministerial acts necessary to bring the corporations into being. It has also been held that the legislature may by special provision in the charter designate persons to issue a certificate of incorporation whenever it shall be satisfied that charter conditions have been complied with.

4. Who may grant charters.—The charters of municipal corporations may be granted by (a) the Congress of the United States; (b) the state legisla-

³ *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

⁴ *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431; *Berlin v. Gorham*, 34 N. H. 266, *LEADING ILLUSTRATIVE CASES*.

tures; (c) territorial legislatures, when authorized by Congress.

By the Federal Constitution, Congress is vested with "power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States," and "to exercise exclusive legislation over such district as may become the seat of the Government of the United States." Under this authority, Congress has organized territories, and also chartered cities and towns within their boundaries.

The authority of the state legislatures to incorporate cities and towns as useful and indispensable agencies in the efficient administration of government is inherent and undoubted. All legislative power not granted to Congress is reserved to the states. As a necessary consequence, a state legislature may enact any law not forbidden by the state or Federal Constitution.

General assemblies have exclusive authority to create municipal corporations within the territorial limits of the states, in such manner and under such conditions as they may ordain. Under this exercise of inherent power have been created the municipal corporations of this country, and by these municipalities are administered all local municipal affairs of millions of people, involving an annual expenditure therefor of multiplied millions of dollars.

The territories possess no inherent or sovereign power. Such power as they have has been expressly granted to them by Congress. The general clause granting to the territorial legislature power over "all

rightful subjects of legislation" has been held sufficient to authorize the legislature to create municipal and other corporations within the territorial limits.⁵

5. Legislative discretion.—The exercise of the legislative functions of creating municipal corporations is wholly within the discretion of the legislature, and not subject to the control of the judicial power.

No power resides in any other department of the government to compel the legislature to enact any law; and no record is found of any case in which the aid of the courts was invoked to compel the legislative assembly to perform the constitutional duty so imposed upon it; nor has any case been reported in which a court has assumed to enjoin the corporation from assuming and exercising its franchises for the reason that the legislature had acted unwisely or had abused its discretion in granting the charter of incorporation. In states where there is no constitutional requirement for popular assent to the erection of a municipality, the power of the legislature to create a municipal corporation is absolute, and its discretion not a subject for inquiry or review by the courts.

The general assembly having, in the exercise of its undoubted constitutional power, decided that a certain village or hamlet ought to be incorporated, and enacted the requisite legislation to that end, all inquiry as to the legislative motive or intention, except as appearing from the act itself, is excluded

⁵ So under the territorial organic act creating the territory of Colorado, the legislative assembly had power to establish a municipal corporation; *Deitz v. City of Central*, 1 Colo. 323.

from judicial consideration. If the act is constitutionally passed, the corporation is lawfully created, and that is an end of the matter. In some states, however, this power of creating involuntary municipal corporations does not exist in the legislature. This is true of Ohio, Massachusetts, and other states where there are constitutional provisions requiring the popular consent before the corporation can come into existence.

6. Legislative power—How exercised.—The legislature, unless specially directed or limited by the constitution, may, in its discretion, create corporations (a) by a special charter; (b) under general legislation authorizing the erection and organization of corporations if done in accordance with the popular will.

When a community desires a charter granting peculiar corporate privileges, or when a legislature thinks that a community should exercise corporate powers of a peculiar character, a special act called a "charter" is enacted for such community. This is peculiarly true in regard to our great cities, all of which exist under elaborate charters specifying the franchises, privileges, and powers of the corporation, the various departments and officers thereof, the duties and powers of each, and, indeed, all other things supposed to be necessary to the well-being of the corporate community which can be enacted into general law. This charter is the constitution of the municipality, which under it may enact by-laws or ordinances not inconsistent with it or with the law of the land.

7. **General charter.**—Municipal incorporation under general law is thus effected: Usually an act is passed prescribing the conditions upon which communities may become incorporated as cities, boroughs, or villages, and directing the steps to be taken to bring about the incorporation. Ordinarily, the provisions of such act are that, whenever the people residing within the boundaries containing a certain number of acres or square miles wish to become incorporated, they shall manifest that desire by public election; then the incorporation shall be effected by another election for choosing the necessary officers to manage and control the affairs of the municipality; whereupon the corporation shall become and be vested with certain powers, privileges, rights, and franchises specified and enumerated in the law. This organization usually takes place under the direction of some court or other existing agency of the state, and the result of the popular action, called a "charter," is properly recorded in the county office.

8. **Constitutional provisions.**—In some states the constitution provides that no corporations shall be created by special law. The language employed in the various constitutions is not uniform or identical, though the pivotal question in each case seems to be whether the general term "corporation" includes municipal corporations. In New York, Ohio, Kansas, and Nebraska, the decisions are to the effect that the word "corporation," or phrase "body politic and corporate," includes municipal corporations as well as private. But in New Jersey, Tennessee, and Rhode Island the holding is to the contrary.

In two states of the Union—Missouri and California—there is a constitutional provision that cities having more than one hundred thousand population may frame their charters for themselves, subject to certain restrictions and limitations expressed in the constitutional provision permitting it.

9. Compliance with conditions.—Substantial compliance with the requirements of the general laws for municipal corporations is essential, and is sufficient. The erection of a municipality is not academic, but political; and so the courts apply, in cases challenging the existence of the corporations, those larger rules of life and action which pertain to public affairs, and give substantial justice.

From these considerations of public policy have arisen a class of corporations known as corporations de facto. A corporation de facto is an existing corporation, defective in some essential feature of organization, but with a right to continued existence which may be impeached only by the state in a direct proceeding for that purpose.

To constitute a corporation de facto, there must be (1) a valid law authorizing incorporation; (2) an attempt in good faith to organize under it; (3) a colorable compliance with this law; and (4) an assumption of corporate powers.

10. Corporations by implication.—A corporation may be created by implication as well as by positive expression of the statute, *provided* there is a clear manifestation of legislative intention to constitute a corporation, or to invest it with corporate powers and franchises, or to recognize an existing body as

having the essential franchises and powers of a corporation. The usual words employed in a royal charter to constitute a corporation were: "We create, erect, found, incorporate," though words of similar import were held sufficient at the common law.

The rules of the common law in regard to corporations are of general application in this country, and wherever powers and privileges existing only under incorporation are conferred upon a body of persons, or upon the residents or inhabitants of a certain town or district, a corporation will be implied, to the end that the grant may not fail.

11. **Popular consent.**—Except in those states where the constitution requires popular assent to the creation of a municipality, it is not necessary that a special charter shall be assented to by the people. Since the municipality is created at the legislative discretion, and for the public welfare, as an instrumentality of government, it is not essential that the inhabitants or residents of the municipal boundaries shall give consent to the charter, as is required in the case of private corporations.

Where the incorporation is under general law, however, the popular assent is usually, if not invariably, required, as an essential feature of the incorporation, and a condition precedent thereto. The state says to its citizens in all its populous subdivisions: "It is permitted to you, but not required of you, to be incorporated as a municipality. Choose whether you will be so. If you vote to apply the provisions of the general incorporation law to yourselves, then and thereby you will become a municipal corporation."

12. **Validity—How tested.**—The validity of a municipal corporation is not subject to private or collateral attack, but is subject to impeachment only by the state in a direct proceeding for that purpose. The state has created the municipality as an agency of government. It may terminate that existence at will. But even the state has been held estopped from denying the validity of the incorporation where the municipality has existed and exercised corporate functions for a long time with the consent of the state; and, whenever the question of the validity of incorporation is raised, there is a strong tendency by the courts, in recognition of the *status quo* (existing condition), to uphold the validity and power of the municipality.

13. **Alteration.**—The legislature also has plenary powers, unless forbidden by the constitution: (a) to change the boundaries of municipal corporations so as to enlarge or decrease their territory; (b) to divide a municipal corporation into two or more separate municipalities; (c) to unite two or more separate municipal corporations into a single one; (d) to amend the charter, either by special or general legislation, so as to increase or diminish the municipal powers; (e) to repeal the charter, and thereby dissolve the corporation.

Territorial changes. In enlarging the boundaries of a municipality, only adjacent or contiguous territory can be attached. The courts of the country have been inclined to restrict the scope of the legislative power in enlarging corporations so as to observe the unity, territorial as well as legal, of a munic-

ipal corporation. Accordingly, it has been ruled that non-contiguous territory cannot be annexed. In some instances the expression is: The land annexed must be contiguous or adjacent. It has also been held that an unoccupied tract of land cannot be added to the territory of a village merely for the purpose of increasing the tax list and village revenue, but that when such lands are platted and held for sale for use as town lots, or held and sold as town property, they may be annexed to the corporation. They may also be annexed when they are needed for any proper municipal purpose, such as sewer, gas, or water, or to supply residence sites for citizens, or when they furnish a present abode for a large number of persons, or are valuable for prospective town uses.

The legislative assembly may also diminish municipal boundaries by excision of a part of the territory. This, too, may be done without consulting the municipality, or that portion of its citizens thus summarily deprived of municipal privileges, unless forbidden by constitutional limitations. In short, this power of increase and diminution of municipal territory is plenary, inherent, and discretionary in the legislature, and, when duly exercised, cannot be revised by the courts.

14. Division of territory.—The legislature may likewise, without the consent of the people of a municipality, divide the same into two separate and distinct municipal corporations. In cases of such division the legislature may apportion the burden of indebtedness between the two, and determine the portion to be borne by each. It may likewise provide

for a division of the property of the old municipality between the two parts thereof. In absence of legislative regulation, each portion will hold in severalty for public purposes the public property which falls within its limits.

15. **Consolidation.**—Likewise it is competent for the legislature, unless forbidden by the constitution, to unite two or more distinct municipalities having contiguous territory into a single municipal corporation, without the consent of those corporations or the people thereof, and also to provide for the disposition of the municipal funds in the several corporate treasuries, or past due at the date of consolidation. Those items of property belonging to the two old corporations so united, unless otherwise expressly provided, become the property of the new corporation, and the corporate indebtedness of the two former corporations becomes the indebtedness of the consolidation.

16. **Legislative power.**—The power of the legislature over a municipal corporation extends to the amendment of its charter in such manner and to such extent as may seem wise to the legislature. An entirely new charter may be enacted for the new corporation, or specific amendments made to the original. Amendments may be made to the general corporation laws, or new general laws may be enacted, which will have the effect of modifying the charter. Mr. Justice Field, touching the dissolution of the municipality of Memphis, said: "There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. There is no such thing as a vested

right held by any individuals in the grant of legislative power to a municipality.”⁶

17. **Dissolution.**—The legislature may, too, at its pleasure, repeal the charter of a municipal corporation, and thereby terminate its existence. The loss of an integral part of a municipal corporation would practically destroy it, as if the people should all remove from the territory, or it should be swallowed by an earthquake or volcanic eruption. The corporations of Herculaneum and Pompeii were as effectually destroyed as the cities themselves, and it cannot be doubted that a municipal corporation would be as effectually destroyed by American as by Roman ashes and lava.

Historically, however, and legally, too, the only form of dissolution known to American municipalities is legislative. Whenever and however, and from whatever motive or purpose, the legislature shall repeal the charter of a municipal corporation, its life is ended.

The citizens and creditors of the corporation, having vested rights in certain property, franchises, and powers of the corporation, may protect and assert them through recognized remedies in the courts of law and equity, state or federal. The pursuit of these remedies by the citizens and creditors is simply the administration of the estate of the deceased.

⁶ *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

THE CHARTER—CREATOR AND CREATURE.

18. **General and special charters.**—Municipal corporations in the United States, with reference to the mode of their creation, are divisible into two great classes: (a) corporations created by special act of the legislature; (b) corporations organized under general incorporation statutes. Every municipal corporation has, or should have, as a warrant for its existence and authority, some official document issued under law by some duly constituted ministerial agent, showing its constitution and the limits of its authority. This document, which is generally called its charter, when issued under a special act, is usually in the form of a duly certified copy of such special act under the great seal of the state; but, when issued under the authority of general statutes, it may take the form of either a charter, or a court decree, or a certificate showing the fact of incorporation for municipal purposes. This document may contain a description of the territory, and a full outline of the powers, such as appear in special charters, or it may be merely a certificate of the fact of incorporation of the specified municipality, in which case reference must necessarily be had to the general statutes for powers and privileges, and to other official documents showing boundaries and further

details as essential conditions precedent to the granting of the charter.

A municipal charter, whatever be its form, is a written document constituting the persons residing within fixed boundaries, and their successors, a body corporate and politic for and within such boundaries, and prescribing the powers, privileges, and duties of the corporation.

19. **American charters.**—An outline of the general features of the modern charter for an American municipality is the following:

(1) The inhabitants of the town or city by its proper name are constituted a body politic and corporate, with right of perpetual succession, and power to use a common seal, sue and be sued, purchase and hold property, etc.

(2) The territorial boundaries are distinctly defined, and the division of the territory into wards.

(3) The governing body of the corporation is ordained, composed of one or two divisions usually called aldermen or councilmen.

(4) The qualifications of the voters are prescribed, commonly the same as voters at state elections; but sometimes the voters are required to be property-owners residing within the corporate limits, or owners of real estate within the limits residing elsewhere.

(5) The officers to be chosen, and the mode of their election are declared.

(6) An enumeration of the powers of the city council, such as to levy and collect taxes, make local improvements, enact local ordinances, punish violations thereof, borrow money, make streets, hold

courts, and numerous other appropriate municipal powers.

This charter, resembling the constitution of the state, is the paramount law of the municipality. But with it must be considered, also, the state statutes and constitution, and the general jurisprudence of America, and the public policy of the state.

20. **Municipal powers.**—Under a general grant of authority to pass such by-laws as shall be needful to the good order of the city, power has been upheld to “establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits.” The general welfare clause has also been held to confer power to prevent the keeping of bawdy-houses; the feeding of cows on distillery slops, and selling their milk within the city; the public exposure for sale, or sale of merchandise on Sunday; the sale of liquor on Sunday; the keeping of saloons, restaurants, and other places of public entertainment open after ten o’clock at night; the carrying on of the laundry business in a certain portion of the city; to forbid all disorderly shouting, dancing, etc., in streets and public places; to regulate the keeping and selling of gunpowder within the corporate limits; to require elevators inside all stores to be inclosed; to prohibit the throwing of heavy or dangerous articles from upper stories of buildings into streets and open spaces near them used as public passways; to establish fire limits, and to prevent the erection therein of wooden buildings; to prohibit cruelty to animals;

to prohibit visiting at gambling houses; and to fix the time and places of holding public markets for the sale of food, and regulating the same.

Powers Denied. But on the contrary, it has been held that the general welfare clause does not authorize a city to aid in constructing a plank road or toll bridge by a private company beyond the corporate limits; nor to require the proprietor of a theater, circus, or other licensed place of exhibition to pay a police officer for attendance upon the place; nor to subject to a fine "any person whose known character is that of a prostitute"; nor to levy taxes upon retailers of ardent spirits; nor to require druggists to furnish verified statements quarterly of the kind and quantity of intoxicating liquors sold, and to whom; nor to exact a license-fee from peddlers in the discretion of the mayor; nor to require cotton merchants to keep a record of their purchases of loose cotton; nor to prohibit street-processions, with musical instruments, banners, torches, singing, and shouting; nor to require a license-tax for a temporary stand for the sale of lemonade, cake, etc.; nor to prescribe a different mode of trial and punishment, in addition to that provided by the state law, for enticing and harboring seamen; nor to regulate and license the sale of liquors, in addition to the state regulation and license; nor to prohibit the retail of liquors by one duly licensed by the state; nor to forbid it during any divine service held within the corporate limits.

21. Corporate powers, classes of.—The powers, functions, and duties of a municipal corporation are

THE CHARTER

divisible into two great classes: (1) governmental: that is, those which are conferred and imposed upon a municipal corporation, as a local agency of limited and prescribed jurisdiction, to be exercised by it in administering the powers of the state, and promoting the public welfare within it; (2) municipal: those conferred and imposed for the special benefit and advantage of the urban community incorporated in a distinct corporate person or municipality.

Under the head of "governmental powers" are classified (a) powers pertaining to the administration of justice; (b) all police powers; (c) powers over eminent domain; (d) powers for the promotion of public education; (e) powers to maintain a fire department; (f) all other charter powers to be exercised by the municipality, as an agency of the state for the benefit of the public, in or for the exercise of which the corporation receives no consideration.

All other charter powers and duties, including not only those which are mandatory, such as the proper care of streets and alleys, but also those powers which are discretionary, such as the erection and maintenance of waterworks, gasworks, and electric plants from which profit may be derived by the municipality, are municipal.

In the exercise of its governmental powers and functions the municipality represents the state; and the officers executing these powers are rather officers of the state than of the municipality, and, as such, they are peculiarly subject to the control of the state while those officers who perform strictly municipal functions are municipal officers to be chosen by the

corporation, and are not so subject to legislative control.

22. Land and people.—Every person residing within the municipal boundaries, whether he will or not, is a member of the corporation, subject to its lawful authority, and entitled to the privileges and immunities of membership, as well as liable to the burdens and liabilities thereof. And persons who come within the corporate limits, though they are only passing through the city, are, so long as they remain within its boundaries, subject to all its police regulations, and bound to obey the same.

The municipal authority is coextensive with the municipal boundaries, and generally is limited by them. The exceptions to the rule that the corporate limits are the boundary of corporate authority are few and special. Some acts give jurisdiction of territory outside municipal boundaries from which the city obtains its water supply; and likewise to prevent nuisances in adjacent territory lying beyond the city limits. A city has also been held to possess implied power to make a contract with an adjoining landowner to give an outlet to its sewage beyond the city limits, and to control the necessary sewer system beyond its limits.

23. Acceptance of charter.—The acceptance of a municipal charter by the citizens of the municipality is not necessary to its validity, unless required by constitutional provisions. Yet it is competent for the legislature to make the grant of charter powers conditional upon their acceptance by a majority of the inhabitants.

All legislative power not exclusively withheld by the constitution is inherent in the general assembly; and, while this power may not be delegated, it is competent for the legislature to prescribe the condition upon which its special enactment may become law, just as under general statutes of incorporation it prescribes the mode in which municipalities may be created by the local action of the inhabitants.

24. **Judicial notice.**—The courts take judicial notice of the charter of a municipal corporation created by special act. It has been ruled that the charter of a municipality is a private act, and, like other private acts, must be pleaded and proven. But the great weight of judicial opinion, and the general practice thereunder, in the United States, warrant the statement that municipal charters will receive judicial notice, though they are special and not general statutes. It follows, of course, that, the charter being a public statute, all amendments and supplements thereto are likewise public. But this rule does not apply to the charter of a city incorporated under a general statute, nor to the ordinances and by-laws of any municipality. Such statutes, ordinances, and by-laws are not only special but private acts, and must be specially pleaded and proven, unless otherwise provided by statute.

25. **General law.**—The charter of a municipal corporation may be obtained and formulated under a general law declaring the powers, privileges, and immunities of the corporation, and authorizing its organization upon popular initiative by officers of the state exercising ministerial functions conferred

for that purpose in the general statute. Under these statutes a required number of the proposed municipality initiate the movement for incorporation by an enumeration of the voters within the proposed precincts, followed by a special election to determine whether a majority of the people favor incorporation. If the vote is in the affirmative, then an election is held for the officers necessary to organize the corporation and set it in motion.

26. Powers classified.—The municipality possesses no other powers than: (a) those expressly enumerated in the charter; (b) such as are necessary for their appropriate use and execution; (c) such as are necessarily inherent in every municipal corporation.⁷

27. Form of charter.—A municipal charter requires for its validity no particular form of words, but is valid and effective if the language employed manifests legislative intention thereby to erect a municipality.

Indeed, it may be regarded as already settled law that a municipal corporation may be created by implication, as well as by the use of the customary words in the charter. But the implication must be natural and necessary, and if, besides the absence of the usual words of incorporation and the omission of the essential properties thereof, there is no language from which either may be implied by the use of the recognized rules of interpretation, then the charter is essentially defective, and the municipality is not created thereby.

⁷ *Winchester v. Redmond*, 93 Va. 711, LEADING ILLUSTRATIVE CASES.

28. **Repeal of charter.**—A municipal charter, whether granted by special law or obtained under general laws, may be repealed by legislative act, either general or special, unless forbidden by the constitution. If the subsequent statute plainly manifests the unmistakable intention of the legislature that the provisions of the former statute shall no longer be in operation, then the repeal is effected; otherwise, the former statute generally remains in operation, even though the two statutes may not be harmonious. A special charter may thus be repealed not only by a special act, but also by a general act of legislation declaring that all municipal charters, or all of a certain class, including the one in question, are repealed, or enacting that the corporations are or shall be dissolved. So a charter under a general incorporation act may be repealed by special public law enacted for that particular purpose, as well as by a general statute, or by constitutional provision necessarily repugnant to, and irreconcilable with, the previous law.

How the charter of a municipal corporation organized under general law may be practically repealed is an interesting matter of inquiry, and has been the subject of much judicial consideration. Where the constitution forbids, the legislature may not pass any special statute affecting a municipal corporation, and therefore it may not repeal any charter by a special act. But in the absence of any such constitutional inhibition, the legislature may repeal any municipal charter by any recognized mode of legislation. By a single act it may repeal a single munic-

ipal charter, or the municipal charters of a certain class of corporations, or all charters of all the municipal corporations within the state.

29. **Governmental supervision.**—In addition to creation, alteration, and dissolution of a municipal corporation, the legislature, by virtue of its sovereign powers, may exercise supervisory control over its governmental functions and public affairs and property. A municipal corporation is peculiarly a government of the people, by the people, and for the people residing within the corporate limits.⁸ And one of the chief functions of such a corporation is the local exercise of the police power thereof. Not only the citizens of the municipality, but all who come within its boundaries, are subject to its jurisdiction. Its authority extends over these as well as the persons who are permanently within this jurisdiction. The exercise of its functions requires lands, goods, chattels, and money. The corporation must buy and sell. It incurs obligations which must be discharged. This property and these obligations may be strictly municipal, or they may be public in the wider sense. Out of this complex body, with its varied powers, purposes, and properties, and the administration of its affairs, must arise, therefore, many kinds of local rights, powers, and obligations, conflicting and complicated. In property bought and held specially for local purposes, the local community have a special interest, as has also the creditor who furnished money for its purchase.

⁸ *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, **LEADING ILLUSTRATIVE CASES.**

30. **Officers.**—In the absence of constitutional inhibition, the legislature has unlimited power of control over those municipal officers who are charged with the performance of governmental functions devolved upon the city, but cannot interfere with those officers who perform functions of a distinctly municipal character. This power is illustrated in many states by the creation of what is known as the “metropolitan police” for the larger cities. This police force is usually appointed and controlled by a board of commissioners, chosen either by the legislature or governor of the state, as an exercise of the sovereign power of legislation and patronage.

31. **Public revenues.**—The legislature has the same power over the public revenues of a municipality as over the immediate funds of the state, and in the exercise of this authority it may appropriate these revenues to any public purpose conducive to the public good. The ordinary revenues of a city are not its property in the sense in which private property is held by an individual. Such revenues belong to the public, and the collection and appropriation thereof by a city is the exercise of a trust function by the municipality for the benefit of the public.

The legislature is the representative of the public in this as well as other matters, and it may change these public revenues from one public channel to another at its discretion. The doctrine is generally recognized that no municipal corporation can have any vested right in the powers conferred upon it for governmental purposes. Therefore revenues

raised by taxation, though levied for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the community.

32. **Municipal funds.**—This power of the legislature to control municipal funds applies only to the strictly public or governmental revenues of the city, and rests obviously upon the sovereign legislative power of the state in all public matters. It does not exist with regard to property in which the municipality has a private interest or creditors have a vested right.

One rule governs public or governmental funds; another and different rule controls in handling quasi-private funds. The public controls the public funds. The municipality disposes of its own funds. The legislature has full power over the revenues of a corporation, the source of which it may prescribe and alter at its pleasure. It may give or it may withhold, for example, the power to grant and tax licenses for various occupations; also the power to levy and collect wharfage or ferriage; or penalties for breach of law or of contract. It may ratify void local assessments; it may compel the satisfaction by the city of non-legal claims against it; it may regulate the use of streets, highways, and other public places; it may transfer the control of the parks, streets, and other public places to a board of commissioners appointed by the state. It may also create a board of police commissioners, and regulate the compensation for them and for the police officers of the municipality, and compel their payment out of the municipal treas-

ury. But quasi-private rights and property are not thus subject to arbitrary disposal.

33. **Franchises.**—Public franchises held by a municipal corporation under legislative grant may be altered or revoked at the legislative will. All municipal franchises are subjects of legislative grant, and, whether granted to third persons or to the corporation itself, may be revoked before the grantee has performed the public service imposed as a condition of the grant. For example, the right to construct waterworks, gasworks, or electric plants, and to supply the city and its citizens with these public utilities necessary for an urban population in modern times, may be granted either to the municipality or to a private corporation organized for that purpose.

34. **Municipal obligations—Vested rights.**—The legislative power of the state over the contracts and obligations of municipalities is limited by the vested rights of third parties, and the prohibitions found in many of the state constitutions. Subject to these limitations, the state has control over the contracts and obligations of a municipality. Parties who have become creditors of a municipal corporation upon faith of the taxing power granted to it to meet its obligations may enforce the execution of this power by appropriate process. The taxing statute is thus held to be a part of the contract whose obligation cannot be impaired; but the mode of taxation may be altered if the change does not materially affect the creditors' security. So, too, certain property may be made exempt from, which was originally subject to, taxation. But where credit has been given

to a municipality upon the faith of a statutory provision that no further bonded indebtedness shall be contracted by the city, an injunction has been granted to restrain an increase of bonded indebtedness, upon the ground that it would impair the obligation of a contract. So, also, creditors may acquire a vested right in a sinking fund provided for their security, so as to authorize them to call upon the courts to prevent any material change in its character, or diversion of it to other uses.

35. **Imposed obligations.**—Upon the elementary principle that duty imposes obligation, the legislature has authority to impose upon the corporation without its consent, and even against its protest, such obligations as will enable it to perform its public functions. A city may be compelled to pay a debt in excess of a legislative limit of indebtedness; to levy and collect taxes and appropriate them to the building and repair of highways, bridges, and canals; also to expend money for the improvement of docks, wharves, and levees; also to collect and appropriate money for the support of public schools of the city, and even to provide for the distribution of money raised by taxation for school purposes after its collection; also to compel the payment by a public corporation of a just debt not enforceable in law or equity; and in a leading case the Supreme Court of New York has carried this doctrine to the extent of sustaining a statute passed levying a tax upon the property of a corporation, and appropriating the same to the payment of a private demand against the town, which had been expressly rejected by the

voters of the town at an election held under legislative authority for that purpose, and intended as a settlement of the right.⁹ But it is equally well settled by repeated decisions that it rests with the inhabitants of a municipality to determine conclusively whether a debt shall be incurred for purely municipal purposes; and in the celebrated Detroit Park Case it was ruled that a public park was a matter of municipal concern, and that the levy of a tax for the purchase and improvement of such parks could not be enforced by the legislature without the consent of the municipality.¹⁰ But the people of Philadelphia were unwillingly compelled to pay hundreds of thousands of dollars annually for the erection of the city hall¹¹ upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city, and well described as "surpassing in extent and grandeur the town halls and cathedrals of the Middle Ages."

36. **Property.**—Public property held by a municipality for the benefit of the general public may be controlled and administered by the state as supreme trustee for the public; but property which has been actually acquired by a municipal corporation in the course of administration, and held for the benefit of the municipality, is not subject to the absolute control of the legislature.

In Michigan, Judge Cooley says: "It is immaterial in what way the property was lawfully acquired,

⁹ *Town of Guilford v. Cornell*, 18 Barb. 615 (N. Y.).

¹⁰ *People v. Detroit*, 28 Mich. 228.

¹¹ *Perkins v. Slack*, 86 Pa. 270.

whether by labor in the ordinary vocations of life, by gift, or by descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the law of the land."¹² It is hardly proper, in other states where home rule is not so highly favored, to speak of any municipal property as private property. It is, however, essentially trust property, the municipality being the trustee, and the people of the locality the cestuis que trustent of strictly municipal property. In New York, too, it was decided that certain real estate held by the city in fee simple absolute under ancient grant, upon which at great expense the city had constructed reservoirs, could not by any legislative action or proceeding be converted into a public park without compensation to the city.¹³

37. Public highways.—The legislature has general control over all streets, canals, rivers and bridges and other public thoroughfares, and may compel the municipality to make such expenditures thereon for their improvement as it deems best for the public welfare.

In Massachusetts it has been held that the legislature may charge the cost of an authorized public improvement upon the municipal corporation chiefly benefited thereby. In Maryland and some other states, so important is this duty to maintain streets and highways that it may be enforced by mandamus

¹² *City of Detroit v. Detroit & Howell Plank Road Co.*, 43 Mich. 140, 5 N. W. 275.

¹³ *People v. Ingersoll*, 56 N. Y. 1, 17 Am. Rep. 178, LEADING ILLUSTRATIVE CASES.

at the suit of a private person without showing special interest or injury. The power of the legislature over streets is so great that it may, so far as the public is concerned, determine to what use they may be put, even to the authorization of a nuisance in them. As a consequence of this, street railways are operated in every city of the country, some by horses and others by electricity.

CHAPTER III.

MUNICIPAL OFFICERS AND THEIR ACTS.

38. **Corporate meetings.**—The corporate affairs of a municipality must be transacted at a corporate meeting of the members of the governing body, duly convened at the stated or notified time and place, a quorum being present, and a majority thereof expressly favoring the action taken. Meetings are of two kinds: stated or regular, and called or special; the stated meeting being fixed in time and place by charter, ordinance, or usage; the called meeting, one specially convened in emergency.

Of a stated meeting every member has due notice by the statute, rule, or usage under which it is held; but of the called meeting reasonable notice of the time and place is required to be given. If extraordinary business is to be transacted, then notice must also be given of its nature. Actual presence of a member not protesting at a called meeting is equivalent to notice. All members must be present or notified to make a valid special meeting. The notice must be personally served, if practicable. Unnotified members who are actually present may avoid the presumption of notification by protesting against the meeting for want of notice.

A majority of the body constitute a quorum, unless it is otherwise provided by law. A quorum is compe-

tent to transact corporate business, and a majority of such quorum is sufficient to take any lawful action, or make an election. Thus, if the body be composed of nine, then five make a lawful meeting and three of these may pass any ordinance or resolution, or commit the corporation to legal obligation.

39. **Mayor and council.**—The executive head of the municipality is the mayor, who is generally also a member of the governing body, and presides over it *ex officio*. The mayor's functions are prescribed in the charter, and differ in various municipalities. In some, as the executive head of the corporation he possesses the veto power, in others the appointing power, and yet in others both of these; in some, as the presiding officer he has power to cast only the deciding vote in case of tie; in others, his functions and duties are the same as those of any other member.

A council composed of *de facto* members, in whole or in part, may lawfully transact corporate business. Corporate council proceedings can only be conducted in corporate meetings, and they cannot be delegated to others to be performed by them.

An adjourned meeting is merely a continuation of the original meeting, and notice is not required for it. At such meeting any business may be transacted which could properly have come before the board at the original meeting, and the mode of proceeding at such meeting is the same as that in the original meeting.

40. **Records.**—Minutes of the proceedings at a meeting of the council duly recorded in the books of the municipality are public records, and as such are

competent evidence either for or against the corporation, as well as third parties, of the corporate acts and proceedings therein recorded. But such proceedings may be proven by other corporate evidence. And any inhabitant, taxpayer, or other person having an interest under the proceedings may inspect the record and have copy thereof on tendering the usual fee.

41. Ordinances.—An ordinance is a by-law of a municipality, enacted by the council or governing body as a local law prescribing a general and permanent rule for persons or things within the corporate boundaries. “By-law”¹⁴ is a general term now applicable to the self-adopted rules of all classes of corporations; “ordinance” is used to describe the self-governing rule of a municipality. It is not so comprehensive as “regulation” and is more solemn and formal than “resolution.” “Ordinance” is a continuing regulation, while “resolution,” though sometimes held to enact a law, is usually declared not to be the equivalent of an ordinance.

42. Enactment.—Where the charter, or the general law, prescribes the procedure for the enactment of ordinances, it must be complied with, else the ordinance is void. For example, if the law requires that the ordinance shall be read at three different meetings before final passage, such provision is mandatory and essential to a valid ordinance. An ordinance should be legislative in form; but this is not essential to its validity. It must be duly recorded, and formally approved, where approval is essential to

¹⁴ Literally, law of the by, and so the local laws of Rugby, Scrooby and Derby.

validity. Publication must be made in the manner and to the extent prescribed in the statute.

43. **Essentials of valid ordinance.**—An ordinance may be void not only for want of corporate power to enact it, or for the failure to observe the prescribed procedure essential to its validity, but also because it is contrary to certain well-established doctrines of the law in regard to such regulations, chief of which are that a municipal ordinance, in order to be valid: (a) must not contravene constitution or statute; (b) must not be oppressive; (c) must be impartial, fair, and general; (d) must not prohibit, but may regulate, trade; (e) must not contravene common right; (f) must be consistent with public policy; (g) must not be unreasonable.

Ordinances have been declared invalid which empower purchasers of land at a tax sale to call upon the police to put them into possession; which impose a license upon towboats engaged in interstate commerce; which required a cotton dealer to report to the police the names of all sellers of loose cotton, with the amount purchased by him; which discriminate between resident and non-resident traders; which donated the bodies of dead animals to certain third parties; also an ordinance imposing the cost, upon abutting property-owners, of repaving a street where the old pavement was still in serviceable condition.¹⁵

44. **Ordinances.**—*Must not be oppressive.* The courts have not hesitated under this wholesome doctrine to invalidate mandatory ordinances which interfere with the ordinary liberty of the citizen, as, for

¹⁵ *Chicago v. Brown*, 205 Ill. 568, LEADING ILLUSTRATIVE CASES.

example, an ordinance ordering the arrest, imprisonment and punishment of a free negro found out of doors after ten o'clock at night; one punishing any person knowingly associating with persons having the reputation of being thieves and prostitutes; so one committing the right to erect and maintain a steam engine and boiler to the unbridled discretion of the mayor; also one denying the use of water from the city waterworks to anyone who owed, or whose tenant owed, a bill for water supplied in a previous year, or to a different house; so one committing to an arbitrary official discretion to allow or prohibit street parades; also one forbidding a licensed retailer of liquors to sell between the hours of six p. m. and six a. m.; and likewise one forbidding such sale whenever any denomination of Christian people are holding divine services.

Must be impartial, fair, and general. A regulation requiring certain water consumers to put in expensive meters under penalty of cutting off the water supply was held void for unwarranted discrimination; so one requiring a certain individual named to do certain acts in respect to a building, and imposing a penalty for non-compliance, was held void; as also one requiring particular individuals by name to construct local improvements in front of their lots; so also one forbidding the repairing, altering, or rebuilding any frame building within fire limits, the cost of which should exceed three hundred dollars; also one prohibiting dairies within certain designated limits without the consent of the city council.

Must not prohibit, but may regulate, trade. Under

this rule an ordinance has been declared void which fixed one rate of license for selling goods which are within or in transit to the city, and another rate for goods which are not within or in transit to the city; so also one requiring municipal licenses from non-residents driving interurban carriages or omnibuses into the city. And it has been held in New Jersey that whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the municipality must show its authority under plain and specific legislative enactment. It has also been held that an ordinance which prohibits any person bringing second-hand clothing into a city or town, or exposing it for sale therein, without proof of its non-infection, is an unwarranted interference with trade.

Ordinances to the following effect have been declared invalid as contravening common right: One imposing a license tax for selling lemonade and cake at a temporary stand on the sidewalk; one requiring a license fee of three hundred dollars from an auctioneer, two hundred dollars from butchers, and twenty dollars from a peddler; one forbidding hotel runners from going within twenty feet of a railroad train, though permitted to do so by the railroad company; and one forbidding the renting of private property to lewd women.

Must be consistent with public policy. Where a statute prohibited incorporated towns from subjecting the stray animals of non-residents to corporate ordinances, a by-law visiting a penalty on the non-

resident owner was held void; and also, in the same state, the ordinance of a municipal corporation with charter power to pass all by-laws deemed necessary for health, cleanliness, etc., and with power to abate nuisances, which restrained cattle from running at large, was held void as being in contravention of the general policy of the state to allow animals to run at large. And where the general statutes of the state abolished the system of hay inspection, and in lieu required the sellers of hay to prepare their hay for market in a particular manner under penalty for non-compliance, a city ordinance prohibiting the sale of pressed hay without inspection was declared void as in conflict with public policy.

45. **Ordinance must not be unreasonable.**—This rule belongs to that class of rules whereby the judiciary have reserved to themselves the power of doing justice in hard cases. Under it the following ordinances have been declared to be unreasonable and void: An ordinance exacting a license from peddlers in the discretion of the mayor; one requiring the building of a sidewalk in an uninhabited portion of the city; requiring all peddlers to pay a license fee of two hundred dollars per month; requiring transients to pay two hundred and fifty dollars per month, and so one requiring a license of ten dollars per day for an itinerant merchant; an ordinance forbidding the running of street cars during the winter months without vestibules; also one prohibiting laundries except in brick or stone buildings; one regulating the weight of baker's bread, prohibiting the sale of loaves weighing less than one and one-half pounds;

one forbidding the covering of packages of fruit with colored netting; one forbidding to drive faster than an ordinary gait; an ordinance exempting from license required of milkmen a dealer having not more than two cows, and delivering by hand; also one requiring license of sojourning auctioneers only; one prohibiting any vehicle used to carry passengers or freight for hire from standing in front of any hotel except when actually engaged in receiving or discharging passengers or freight; also one requiring a street car company, under penalty of twenty-five dollars, to sprinkle its track; also one compelling the construction of a cement sidewalk in lieu of a substantial plank walk; imposing a tax of fifty cents a pole on an electric company; an ordinance requiring a railway company with only one night train, passing at eight o'clock, to keep an electric light at every street crossing from dark to dawn; one requiring railway companies to keep flagmen by day and red lanterns by night at ordinary street crossings where there was no unusual danger; one prohibiting the company from moving its cars across the street for the purpose of distributing them in its yards between the hours of six a. m. and eleven p. m.; one requiring a theater manager to pay a police officer two dollars per night for attendance at the theater to preserve order; prohibiting any person from permitting drunkards or disorderly persons to assemble at his house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business.

46. **What are reasonable and valid ordinances.—**
On the contrary, ordinances impeached as unreason-

able have been sustained as valid in the following instances: Forbidding the keeping of a livery stable in a certain locality, or shoddy or carpet cleaning in a particular neighborhood; one requiring itinerant dealers to pay more license fee than regular merchants; a license of peddlers exempting home producers; an ordinance prohibiting a hotel porter from soliciting on the premises of railroad companies; one limiting the speed of trains to five miles an hour and requiring bell ringing within the city limits; one forbidding such amount of drum beating and horn blowing on the streets as to annoy citizens; one requiring bicycle riders to ring a bell on approaching a crosswalk; one establishing a hack stand; one requiring a passenger on a street car to use his transfer within a time limit, and prohibiting him from selling or transferring the same; one requiring stages and other vehicles to keep off certain narrow and crowded streets; one forbidding sellers of perishable fruits from keeping their vehicles longer than twenty minutes at a stand on a public street between certain hours of the day; one forbidding a hackney coach to stand within thirty feet of an entrance to a public building; one requiring vehicles for hire to occupy designated stands. So also an ordinance regulating the handling of trains in a city is valid which forbids trains from standing across a public street longer than two minutes, or from stopping on a public street crossing except in case of emergency; requiring flagmen at dangerous crossings; forbidding strangers from getting on or off moving trains; also ordinances requiring street railway companies to make quarterly

reports of the number of passengers carried; requiring them to pave the streets through which their tracks run; to provide a driver and conductor on each car. A city may likewise regulate markets by ordinance providing that huckster wagons shall not stand in the market place for more than twenty minutes during certain hours; that fresh beef shall not be sold in less than quarters except between dawn and nine o'clock a. m.; that only licensed occupants of stalls shall offer meats for sale at retail.

Liquor selling. And, in regard to liquor selling, ordinances have been held valid which limit the licenses to one for each one thousand of population; so of one which limits the district or precinct in which liquor may be sold; which prohibits druggists from selling except from prescription; which forbids license unless assented to by two-thirds of the freeholders within a radius of three miles, or without the consent of the county officials; so of one which requires closing of saloons at nine, ten, and eleven o'clock at night, respectively, and from half-past ten to five a. m., and from midnight to five a. m.

Sanitary and police. So also ordinances have been sustained which require lot-owners to clean the snow from the sidewalk; that require restaurants to close at ten o'clock at night; that require keepers of hotels, restaurants, and boarding-houses to report the names of lodgers or boarders, and pawnbrokers to report property received, and description of persons delivering the same, and which prohibit them from purchasing the articles pawned; also ordinances requiring garbage to be removed in a closed vehicle labeled

“Garbage”; and one requiring a lot-owner to remove filth from a private way adjoining his land; also one cutting off gas and water from consumers delinquent for ten days; also forbidding the carrying of deadly weapons,¹⁶ or removing house-dirt or offal through the streets.¹⁷

47. **Procedure.**—A penalty is a necessary part of an ordinance; but power of forfeiture or imprisonment must be expressly conferred on the municipality. The nature and form of complaint, evidence, and trial for violation of municipal ordinances are so varied in the several states by constitutions, statutes, and decisions therein as to be regarded as matters of local rather than of general law, and therefore are not susceptible of general statement and treatment.

48. **Officers.**—A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties, and privileges. A municipal agent is one employed and intrusted by a municipality with discretionary power to represent it in dealings with third persons. A municipal employee is one engaged in the service of the municipality.

The office endures; the officer is temporary. His term is usually fixed by law, and for a certain period. The law also defines the scope of his powers, duties, and privileges, and thus endows him with a portion of the governmental authority.

An agency is a position of like trust, responsibility, and discretion; but it is distinguished from

¹⁶ *Judy v. Lashley*, 50 W. Va. 628, LEADING ILLUSTRATIVE CASES.

¹⁷ *Vandine, Petitioner*, 6 Pick. 187 (Mass.), LEADING ILLUSTRATIVE CASES.

an office by the fact that it is not permanent, but temporary, and was created for a special object.

“Employee” is used to describe one occupying a permanent municipal position and performing a continuing service, but not clothed with discretion, and with no power to represent or bind the municipality.

49. **Officers classified.**—The officers of a municipality corresponding to its powers are of two classes: governmental and municipal. City comptrollers, treasurers, and auditor are obviously municipal officers. So, likewise, the firemen and members of the fire department have been declared to be municipal rather than public. The mayor has been held to be, in Missouri, a municipal officer, and in Michigan, a state officer; but it is believed that the former accords with the general current of decisions, as it does with the reason of the law. He is the official head of the municipality, its chief executive officer, the president of the corporation, and specially identified with the local interests centering in the municipality.

50. **Eligibility.**—Qualifications for holding municipal offices are usually prescribed by the constitution and general statutes of the state, but are often expressed in the charter of the corporation. When qualifications are fixed by the constitution, the legislature cannot impose additional requirements either by charter or general law. Neither can these be fixed by municipal ordinance, nor can statutory qualifications be changed by ordinance. Residence is generally a qualification; but non-residents have been held eligible to municipal office. A property qualification may also be prescribed by law.

Choice and duties. The mode of selecting municipal officers is prescribed in the charter or the general law, and varies greatly in different states and in the several municipalities of the same state. The mayor and members of the governing body are elected by the people; but the treasurer, comptroller, marshal, attorney, and members of boards are chosen in some corporations by the people, and in others by the council. All officers, howsoever chosen, occupy a fiduciary relation to the corporation, and must act solely with reference to the welfare of the community.

51. **Officers de facto.**—An officer de facto is one who, under claim of right or color of title, holds an office de jure, and performs the functions thereof with the acquiescence of the public. A mere usurper or intruder is not an officer de facto. He lacks the color of title and the public reputation and acquiescence essential to a de facto officer. Nor can one be a de facto officer unless he is actually holding an office de jure. Where no office legally exists, the pretended officer is merely an intruder, to whose acts no validity can be attached.

52. **Salary.**—The salary prescribed by law for the official services of a municipal officer is considered the full compensation for all such services rendered by him during his term of office, even though his duties be increased by emergency or by law during the term. The compensation of public officers is under the control of the legislature, by which it may be increased or diminished. Likewise the duties of the office may be made more or less onerous by legislation, or may be increased by emergency arising

during the term. The officer accepts the office in view of all these possible conditions, and impliedly undertakes to render whatever service may be required, either by law or by emergency, during his official term, for such compensation as the legislature has provided or may provide during the term. The incumbent holds over whenever there is a failure to elect his successor, unless such failure is due to his own official negligence, in which case he is forbidden to profit by his own wrong.

53. **Title to office.**—The title to an office cannot be tried or determined in a collateral proceeding, but only by direct contest. This rule applies only to officers *de facto*, and will not prevent a party from showing that an alleged or pretended official action was taken by a mere usurper or intruder, for in such case the act is void.

Resignation. At common law, both tender and acceptance were essential to effect the resignation of municipal officers; but this rule, though recognized still in some localities, is not generally regarded as the law in America. The doctrine is still recognized in Virginia, North Carolina, Tennessee, Kansas, and perhaps some other states; but the contrary has been expressly ruled in Iowa, Ohio, Nebraska, California, and other states, and is more consonant with American habits of thought. However, it has been held by the federal courts and the courts of Texas and Illinois that, when the law provides that an incumbent shall hold office until his successor is elected and qualified, he is not relieved from the duties of his office even by the acceptance of his resignation, but

he must await the qualification of his successor to the office.

54. **Judicial control.**—Municipal officers are subject to judicial control by mandamus, injunction, or amotion to compel performance of judicial duties, observance of the law, and removal of unworthy officers. The jurisdiction of courts in supervising official action is generally limited to ministerial duties. But where power is given to a board of supervisors to fix water rates, the rate fixed must be reasonable and just, so as not to amount to a practical confiscation of the property of the water company; otherwise the courts will interfere. So, also, if any officer refuses to perform a mandatory duty, its performance will be enforced by mandamus, for contempt of which the officer may be punished. Nor can he escape this penalty by resignation after service of the process. So, also, officers may be enjoined from illegal acts threatened under color of their official position.

55. **Removal.**—Generally, the power of removal is an incident of the power of appointment; and, where an officer holds during the will and pleasure of the appointing power, that power is also the removing power, and is sole judge of the propriety of removal. The legislature may authorize the removal of appointive officers at the will of the appointing power, but an elective officer can be removed from office only by due process of law. The power of removal includes the power of suspension pending trial. This power may be conferred either upon the mayor or the governor of the state; but in case of conviction of crime which disqualifies from holding

office, the court may pronounce the sentence of disqualification and removal.

56. Liability on contracts.—Without special personal undertaking, officers are not personally liable upon contracts made by them for and on behalf of the corporation. But it has been held that an overseer of the poor makes himself personally liable by promising that he will be responsible for the payment of the charges. In fine, the rule is well settled that wherever the parties understand that the contract is made by the officer on behalf of the corporation, and it is within the scope of his authority, the corporation alone is liable, and the officer becomes personally liable only upon manifest intention to that effect.

57. Liability for torts.—If the duty imposed upon an officer is a duty to the public, the failure to perform it or an inadequate or erroneous performance is a public injury, and must be redressed, if at all, in some form of public prosecution. But if, on the contrary, the duty is a duty to an individual, then the neglect to perform it properly is an individual wrong, and may support an individual action for damages. It is a general rule that judicial officers acting within their jurisdiction cannot be held personally liable for the improper or erroneous performance of their duties. But it is commonly held that this exemption from liability in the performance of discretionary public functions does not exist when the officer has been actuated by corrupt or malicious motives, or has practiced fraud upon the person suffering injury. On the contrary, the general rule

is that in the performance of merely ministerial duties an officer is liable to third persons for injury suffered by his nonfeasance or misfeasance.

For example, a board of street commissioners, in determining upon the work to be done, on adopting plans and specifications therefor act as judicial officers, and no private action will lie against them for damage done in exercising these functions. But if they undertake to execute these plans and specifications either personally or with the aid of employees, they are liable to third persons for injury suffered from such acts, which are done in a ministerial capacity. It has accordingly been held that a mayor, marshal, and board of health were liable for negligence in removing from the city a smallpox patient and carelessly exposing him to inclement weather so as to cause his death. Also, a public meat inspector is liable for failing to discharge his duty; and street officers for injury done to an adjoining property by changing the grade of the street.

CHAPTER IV.

CONTRACTS AND IMPROVEMENTS.

58. **Municipal contracts.**—Municipal contracts possess the same essential elements, and are executed, enforced, rescinded, and reformed under the same general doctrines as those governing contracts between individuals. Within the scope of its charter powers and in the manner permitted by law, a municipal corporation may enter into contract relations with other persons, having the same general effect and obligation as those of a private corporation or a natural person, and for breach of such contract it will incur similar liability. The courts will enforce such contracts and redress the breach thereof, either for or against the municipal corporation, in the same manner and to the same extent as other contracts between other classes of persons. Such contracts are usually written and signed on behalf of the municipality by the duly constituted authority; but when properly authorized, a valid municipal contract may be made by parol; and there are many cases giving redress against municipal corporations for breach of implied contracts of the municipality.

59. **Ultra vires.**—The capacity of the municipal corporation to make a binding contract is dependent upon power, express or implied, conferred upon it by its charter; and contracts made by a municipality repugnant to or outside of the scope of its charter are

ultra vires and void.¹⁸ Two propositions are settled: One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which has created it consents, ultra vires; the other is that the powers of a corporation are such, and such only, as its charter confers, and an act beyond the measure of these powers, as either expressly stated or fairly implied, is ultra vires.

Illustrations. Therefore it has been declared that contracts by which a municipality gave away or exchanged city streets for other property, offered a reward for the apprehension of a person, borrowed money to pay the expenses of an election contest over the removal of a county seat, or to make loans and donations to colleges, are ultra vires, and not enforceable at law. In fact, there is at present general concurrence in the doctrine that the law will not recognize or enforce a municipal contract which it does not authorize. Parties, therefore, seeking recompense for money loaned, material furnished, or labor done for a municipal corporation under an ultra vires contract do not sue for breach of the contract or seek specific performance thereof, but seek recompense either upon the theory of an implied contract and assumpsit, or under some doctrine of equity.¹⁹

60. **Estoppel.**—Municipal contracts which are within the scope of corporate powers, but which are

¹⁸ Quincy v. Bull, 106 Ill. 337, LEADING ILLUSTRATIVE CASES.

¹⁹ London, etc., Land Co. v. Jellico, 103 Tenn. 320, LEADING ILLUSTRATIVE CASES.

defective because of irregularity in the method of their execution, or unlawful because of a secret purpose of the corporation, are not void, but are subjects of ratification and estoppel. And so, if the corporation under a contract of this kind has obtained value from the other party, it cannot avoid or rescind the contract except upon the condition of complete restitution or recompense; and if the municipality recognizes such contract, with full knowledge of the facts, it may thus waive objection and ratify the same and become bound thereby; as, where officers or a board having no authority therefor make a contract for a city within the scope of its charter powers, the common council or other board empowered to make such contract may subsequently adopt or ratify the same, just as a natural person may ratify the unauthorized contract of his agent.

But the doctrine of *ultra vires* does not absolve municipal corporations from the principle of common honesty. And so "where an act in its external aspects is within the general powers of a corporation, and is only unauthorized because it is done with a secret unauthorized intent, the defense of *ultra vires* will not prevail against a stranger who in good faith dealt with it without notice of such intent."²⁰ Also where the other contracting party has in good faith performed his part of the contract, the municipality will be held estopped from pleading the shortcomings or faults of its own officers or agents in all cases where the contract is not repugnant to or beyond the scope of the corporate power. But if the

²⁰ 2 Dill. Mun. Corp., § 936.

contract be ultra vires in the true sense, then neither estoppel or ratification will prevent the municipality from pleading ultra vires, and thereby defeating an action brought upon the contract.

61. **Partial validity.**—A contract is not of necessity entirely invalid because a portion of it is ultra vires. In such case, if the portions of the contract which are within the charter powers are separable from the ultra vires portion, the latter only is void. In a leading case the city had made a contract for paving its streets, to do which it was fully authorized, and promised to give its negotiable bonds in payment therefor; but for this it had no authority. The court ruled that, though specific performance might not be decreed in behalf of the contractors, yet the action for damages was maintainable. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment may not be made at all; such is not the law. The contract between the parties is in force so far as it is lawful."²¹

62. **Implied promise.**—A municipality may be liable in assumpsit upon an implied contract to pay value for what it has received, where it has made no express promise therefor, or has made an invalid promise which will not sustain an action. The doctrine of implied municipal liability applies to cases "where money or other property of a party is received under such circumstances that the general law, inde-

²¹ *Hitchcock v. Galveston*, 96 U. S. 341.

pendent of express contract, imposes the obligation upon the city to do justice with respect to the same."²² In general, whenever a municipal corporation receives money or property, or accepts the benefit of labor or services rendered to it, it is bound in law to make recompense therefor.²³

To maintain assumpsit against a municipality, however, the money must have gone into its treasury, or been appropriated by it; and, when it is property other than money, it must have been used by the municipality or been under its control. But with reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance, or express corporate action to that effect. If not originally authorized, no liability can attach upon any ground of implied contract; the acceptance, upon which alone the obligation to pay could arise would be wanting.²⁴

Municipal contracts, whether made under express, implied, or inherent power to contract, must necessarily be confined to such subjects only as are usually proper and essential for performance of the corporate functions of the municipality. A municipality, therefore, though it may contract not only with regard to its strictly public functions, but also with regard to such municipal matters as lights, water, and power for the use of itself and its inhabitants, has no authority to embrace within its contracts such subject-matter as manufacturing, extraterritorial railway

²² *Argenti v. San Francisco*, 16 Cal. 255.

²³ *City of Louisiana v. Wood*, 102 U. S. 294.

²⁴ *Argenti v. San Francisco*, 16 Cal. 255.

construction and operation, or merchandising, nor may it become surety, nor issue a circulating medium, unless such powers have been specially conferred upon it.

63. **Agents.**—Municipal contracts are necessarily made for the corporation by its duly constituted and authorized agencies, which may be either boards or individuals. The common council is the proper general agent of the municipality to express the agreement either by ordinance or resolution upon the municipal record. The formal execution of the memorandum or indenture of contracts is usually committed to the mayor and recorder or other appropriate executive officer. Moreover, persons contracting with the municipality are bound to take notice of the limits of the agent's authority; and a contract made by a public agent within the apparent scope of his powers does not bind his principal in the absence of actual authority. But if the contract is made by the common council as general agent of the municipality, and within the scope of the corporate powers, express or implied, the authority as agent may be presumed.

Ratification is governed by the same rule as the making of contracts. The power to make such ratification belongs generally to the common council; but it may be made by the particular municipal agency which has the power to make the original contract.

64. **Mode of contracting.**—Wherever the mode of negotiating and executing a municipal contract is plainly and specially prescribed and limited, such mode is exclusive and must be substantially pur-

sued; else the municipality will not be bound by the contract.

The act of incorporation becomes an enabling act. It gives municipalities all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. Modern decisions have established the law to be that contracts of municipal corporations need not be under seal unless the charter or other legislative enactment so requires; and so it has been held that a municipality may be bound to a contract by ordinance or by a resolution of the common council, or even by parol agreement made through a duly authorized agency.

The mode of letting a municipal contract is usually prescribed by the legislature, and, as we have seen, must be pursued. The statutes and charters, though varied in phraseology, generally contain requirements that the letting shall be upon previous advertisement, and sealed bids based on plans and specifications, and to the lowest responsible bidder.

The following general rules prevail as to letting of municipal contracts: (1) That publication must be made substantially as prescribed, though it has been held that in case of emergency, where delay would work irreparable injury to the municipality, a bona fide contract, free from fraud and favoritism, and at a reasonable price, was valid without preliminary advertisement. (2) That plans and specifications for the contract may be either published in the advertisement or referred to as on file in a particular office,

or may be furnished on application. (3) That bids must remain sealed until the day specified for opening them, to the end that the municipality may have the benefit of fair competition among the bidders; that all bids must be on file within the time limited by the advertisement, and must be publicly opened at the time and place, and by the officer, prescribed by the statute, or in charge of the biddings. (4) That, where the advertisement promises a contract to the lowest bidder, the authority in control of the biddings may reject all bids unless otherwise peremptorily directed by the charter, and no right of action will lie against the city for anticipated profits of the contract.

65. **Illegal contracts.**—Municipal contracts, like the contracts of private corporations and individuals, are also illegal and void whenever they are contrary to law, to public policy, or to good morals. It is a fundamental rule that aldermen and officers of a municipality must not make contracts with it. This is a universal rule, unyielding in its application, and founded on the purest public policy. It prohibits municipal contracts with private corporations in which members of the council may be interested. Such contracts are said to be fraudulent in law, and hence illegal and void.

A promise to pay a public service corporation or its agents a premium for doing their duty is illegal and void. A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. This applies to a promise by a city to surrender its right to lay out a street; also to a contract binding the city authorities not to exercise their

legislative powers in a certain manner in the future; and a contract to employ none but union labor, or to buy only such articles as have a union label.

A contract in violation of a statute or constitution is also illegal and void. And so a municipal contract obtained by means of a combination of contractors to prevent competition is illegal and void, not only as being contrary to statute, but also against public policy; and a municipal contract granting exclusive rights and franchises made by a city otherwise than in the exercise of its police powers, is likewise illegal and void.

66. **Annulling contracts.**—A municipality has no power to annul its contracts arbitrarily, but may renounce, terminate, or rescind them only on the same terms and under the same conditions as other contracting parties. Municipal contracts are held to be made in the exercise of municipal rather than governmental powers. The contracting parties are equal before the law, both as regards the making and performance of the contract, and each has the same right and remedy as the other. The city, therefore, possesses no power of annulling its contracts in virtue of its public character. The analogy of the law of private corporations is generally recognized as controlling in such matters.

A municipal contract cannot be impaired by state legislation. Legislative control over municipal powers, and even municipal existence, as we have seen, is unlimited. It can create, direct, control, modify, and destroy the municipality; but it can pass no law impairing the obligations of a municipal contract.

However great the control of the legislature over the corporation while it is in existence, this must be exercised in subordination to the principles which secure the inviolability of contracts.

67. Money contracts.—The inherent or implied power of a municipal corporation to borrow money and execute negotiable paper or municipal bonds therefor is an unsettled point of municipal law in America, a majority of the cases seeming to recognize the existence of that municipal power, while the weight of the reasoning denies it except where expressly conferred.

The following views of Judge Dillon are sound doctrine:²⁵

(1) Municipal expenses are based upon municipal revenues, and the power to borrow money as a means of making future improvements or meeting current expenses cannot be implied from the mere authority to make such improvements, or from the usual grants of municipal power.

(2) The nature of the usual functions of a municipality is so widely different from that of a private corporation as not to warrant the use of analogy to determine the inherent powers of the municipality as to borrowing money and issuing commercial paper.

(3) The power to issue negotiable paper, unimpeachable in the hands of the holder, is not an inherent or implied power of a municipal corporation.

(4) Power to issue negotiable paper may be properly inferred from the express power to borrow money granted to a municipality.

²⁵ 1 Dill. Mun. Corp., § 125.

(5) Municipal paper, negotiable in form, if issued by a public corporation required to audit all claims and issue to the creditor warrants or orders therefor, is subject to all legal and equitable defenses in the hands of a transferee, as of the original holder.

68. **Municipal improvements.**—Municipal improvements include all those additions to or changes in the municipal property, made by the use of money and labor or skill, for the purpose and with the effect of enhancing taxable values or ameliorating conditions of life in the municipality. They are necessarily public, but may be either local, as conferring special benefits upon a certain street, block, or section; or general, as bettering the entire municipality. The latter are generally paid for out of the municipal treasury, the former by local taxation.

Streets must be laid out, graded, curbed, guttered, paved, and lighted; sidewalks must be laid; municipal buildings must be erected; water must be furnished, sewers constructed, and in these times electric plants are coming into municipal use to furnish not only light but power for municipal purposes. Parks, also, are urban necessities, and boulevards contribute greatly not only to the beauty but the health of a city. Nor are public schoolhouses, halls, hospitals, and auditoriums to be omitted. The construction and care of all these things properly appertain to a modern municipality, and they are embraced within the comprehensive term "improvements," whether they are general in their nature, for the common use of all the citizens, or, by reason of being local, afford special benefits and advantages

to citizens owning property or living in a particular locality.

69. Power to make or aid improvements.—The power to make general improvements is inherent in every municipality; but the power to make local improvements at the expense of the locality must be conferred expressly by the charter or by statute, or plainly implied. The general amelioration of urban conditions is the paramount object of municipal incorporation. So no express authority is necessary to be given to a city to require lot-owners to lay sidewalks in front of their property; and if a lot-owner fails to make such improvement, when notified to do so, the city may do the work, and collect the cost thereof from the property-owner.²⁶ And a city not only may, but must, take proper care of its streets and alleys; and this it may do, at an expense within the limit of its annual revenues appropriated to that purpose, without express charter authority. It may also, without express grant of power therefor, contract with a gas or electric company to provide light for the city; but if an extensive scheme of grading and paving at great expense is to be entered upon, requiring more than the annual revenues, and thereby incurring large municipal indebtedness, or if, at large expense and by municipal loan, the city wishes to construct its own gas or electric plant, it must have express legislative authority therefor.

70. Preparations for improvements.—It is essential to the validity of any scheme of improvement that all the substantial requirements of the charter

²⁶ *City of Pittsburgh v. Daly*, 5 Pa. Super. Ct. 528.

or statute authorizing the same shall be strictly observed and complied with. Municipal repairs or slight betterments made within the limits of ordinary revenues are not generally considered to be included in the meaning of the term "improvements." This word is commonly employed to describe such local or thorough changes in physical conditions as involve extraordinary expenditure or unusual taxation. It is usually conditioned upon the assent of those to be burdened by the proposed improvement. If it is general, the assent is required to be manifested by a popular election showing the favor of a bare majority or two-thirds or three-fourths of the entire vote cast, or of all entitled to vote in the election. If it is a local improvement, the condition precedent may be either a petition for the improvement, generally required to be signed by a majority of all freeholders to be affected thereby; or a judicial declaration by some court *pro hac vice* (for this purpose). These provisions are mandatory, and compliance with them is absolutely essential to the exercise of the power.

The rule of strict construction is also applied to statutes giving this power of special or extraordinary taxation. A guardian of children cannot be counted to make a majority of property-holders signing a petition; nor one of two joint tenants; nor a life tenant. The names of property-holders upon an original petition to the council, which has been laid upon the table, cannot be added to those subscribed to a subsequent petition for the same improvement, in order to make a majority.

Where the council is vested with power to order and make the improvement, either upon petition or notice, and these formal requirements have been complied with, the power of the council is discretionary and quasi-judicial, and its decision is conclusive in the absence of mistake or fraud; and the courts will not interfere to prevent it because of alleged prodigality or inutility. And where the council is authorized, either expressly or by fair implication, to determine whether a majority of property-owners have requested the improvement, their action in ordering the improvement thereon is a conclusive determination of that question.

71. Conditions of contract for improvements.—

A municipal contract for public improvements is subject to the following limitations and conditions: (1) The subject-matter of the contract must have been included within the ordinance or resolution ordering the improvement; (2) the contract must not surrender or abdicate any public function or duty; (3) it must be let and made in the prescribed method. At every step in the transaction there is a challenge of authority which the contractor must heed at his peril: (a) Has the legislature under the constitution power to grant authority to the municipality? (b) Has the legislature duly conferred such power upon the municipality? (c) Has the governing board of the municipality, in pursuance of such authority, ordained that the improvement shall be made? (d) Is the proposed contract within the scope of the ordinance? (e) Is the person assuming to represent the city in making the contract an authorized agent

thereof? If an affirmative answer can be given to all these questions, the contractor may feel secure in proceeding under his municipal contract.

To determine whether the contract is within the scope of the ordinance, particular attention should be directed to ascertaining whether the contract is (1) within the topographical limits prescribed in the ordinance; (2) within the monetary limits fixed therein; (3) of the nature of the improvement ordained by the council. But under a statute giving a corporation authority to construct sewers within the municipality and beyond it, the town may construct sewers within its territorial limits, and in that of adjoining municipalities to secure an outlet.²⁷

No public corporation may in any way alienate or surrender the trust powers conferred upon it for the public welfare. Of this nature are police powers, eminent domain, control of streets, and the like. A contract, therefore, with a gas or water company, permitting it to use the streets of a city for the purpose of laying down its mains, cannot obstruct a city in the exercise of any of these public powers; and the company cannot enjoin a contractor from grading below the level of the pipes, and thus requiring them to be relaid below the new level of the street. Nor will a contract right of a street railway to use the city streets prevent work under a contract to regrade the entire street, and thereby disturb the bed and track of the railway, even though the company had itself agreed to make the improvement.

A contract for a public improvement is one for per-

²⁷ *Butler v. Montclair*, 67 N. J. Law 426.

sonal services and skill, and not assignable without the consent of the municipality, and therefore the assignee can maintain no action against the municipality for services rendered by him. A contract let under bidding is made and executed only when a bid has been accepted by the proper agency of the municipality in the manner required by statute. But the acceptance and use of the thing contracted for is a completion of the contract, and estops the corporation from objecting to merely formal matters; also, where the contract provides that matters of uncertainty or dispute arising under a contract in making the improvement shall be submitted to arbitration, no action can be maintained by either party without first offering to make such submission.

72. No damages for improvements.—No action lies at common law against a municipal corporation for damages resulting to the property of an individual from the prosecution, with reasonable care and skill, of duly authorized works of municipal improvement.

In the leading case of *O'Connor v. City of Pittsburgh*,²⁸ in which, by a reduction of seventeen feet in the street grade, a church which had been erected according to directions of the city regulator was rendered worthless and required to be torn down, the court said:

“We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled not only in Penn-

²⁸ 18 Pa. 187.

sylvania, but by every decision in the sister states, except one. * * * The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamed that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable." The authority which was given the city by its charter empowered it "to improve, repair, and keep in order the streets."

It was ruled in that case that, since the work of improvement did not trespass upon the land of the plaintiff, no property of the plaintiff was taken within the meaning of the constitutional provision requiring just compensation in case of exercise of the power of eminent domain, and therefore plaintiff could not evoke the protection of the Constitution. Since the decision in that case many states have incorporated into their constitutions a provision that private property shall not be taken or damaged for public use without just compensation therefor; and most of the other states have obtained the same result by legislative enactment.²⁹

The remedy for obtaining compensation is various in the several states. In some of them the property-holder must appear before the city council and there present his claim for damages, which damages are thereupon estimated by some tribunal provided by statute. In other cases a proceeding must be brought in court by the corporation exercising eminent do-

²⁹ The state of Ohio has always maintained municipal liability for such incidental injuries; *Goodloe & Smith v. Cincinnati*, 4 Ohio 500.

main against the property-holder, wherein the property is condemned for the public use, and the damages therefor are duly ascertained; or, if the municipality shall omit to take this proceeding before entering upon the work of improvement, the property-holder may bring it for the purpose of obtaining compensation, with practically the same result as if brought by the municipality. It has often been held that payment of damages must precede the taking of private property for public use; but unless this is provided by statute it has generally been held sufficient that adequate provision is made for ascertaining and securing the compensation.⁸⁰ The property-holder is entitled to demand compensation as soon as the appropriation has been definitely decided upon, without waiting for the actual taking.

73. Special assessments.—Special assessments for municipal improvements are authorized and made upon the idea that property enhanced in value by such improvements should bear the expense thereof, not as a burden, but as compensation for benefits specially conferred thereby. The authority of the legislature to provide for these local assessments has been established by repeated judicial decision declaring not only their constitutionality, but also their reasonableness. For example, the Supreme Court of Missouri has happily said: "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. * * * General taxation for a purely local purpose is unjust. It burdens those who are not benefited,

⁸⁰ *Sage v. Brooklyn*, 89 N. Y. 189.

and benefits those who are exempt from the burden." ²¹

Whether a given improvement is expedient and necessary, and whether it is general or local, are legislative questions; and when the municipality is vested with power to determine them the municipal decision is conclusive, and not subject to review by the courts. This general doctrine is modified by decisions in some states that there may be judicial inquiry on charge of fraud, mistake, oppression, or corruption, and, if sustained, the court may vacate the municipal ordinance or enjoin the work of improvement. It has also been held that similar remedies may be employed in cases where local assessment has been made for what is obviously a work of general municipal improvement; and it is established law that such remedies may be resorted to when the special assessment is not authorized by statute, or is made without compliance with the statutory conditions precedent. Where discretion is to be exercised by any tribunal in determining whether a special assessment shall be levied, or what portion shall be imposed upon particular property, each owner is entitled, under constitutional guaranty of due process of law, to such notice as will enable him to challenge the expediency of the improvement or the justice of the levy.

Local assessment is obviously an exercise of the taxing power; and yet such assessments have generally been held not to come within the meaning of the word "taxation" as used in clauses of revenue stat-

²¹ Lockwood v. St. Louis, 24 Mo. 20.

utes exempting certain property from taxation. For example, "all public taxes" has been held not to embrace local assessments; so also of the phrases "rates and assessments"; "taxation of every kind"; "taxation of every description"; "all taxes, either state, parish, or city"; "all and every county, road, city, and school tax"; "taxes of every kind"; "charges and impositions"; "any tax or public imposition whatever"; "taxes, charges and impositions." In short, exemption from general taxation does not exempt from local assessment.

74. Collection of same.—Special assessments, being charges upon particular property, may be collected by enforcing the lien on the property in the method prescribed by the statute. In some states they have been held to afford ground for personal judgment against the property-owner; but the weight of authority, as well as the reason of the matter, opposes such remedy for the enforcement of a special assessment. No valid lien exists unless the assessment has been made in substantial compliance with the provisions of the enabling act. When these have been complied with, the lien becomes fixed in favor of the city, and is not impaired by official misconduct or defective performance in the work of improvement.

The power of the legislature to declare a local assessment to be a personal charge against the owner as well as a lien upon his property has been strenuously contested in many states, while in others it has been allowed to pass unchallenged. In a recent Alaska case it was held that abutting property-own-

ers who had petitioned the city for a specific street improvement, and had seen the improvement made in accordance with their petition in front of their property, were liable to the municipality for the cost of the same in an action of assumpsit upon an implied contract for materials furnished and work and labor done.³²

³² *Town of Nome v. Lang*, 1 Alaska 593.

CHAPTER V.

POLICE POWERS AND PUBLIC HIGHWAYS.

75. **Police power inherent.**—The police power, inherent in the state as a paramount and inalienable attribute of sovereignty, is essential to a municipality as a public corporation.

Says Blackstone: "The due regulation and domestic rule of the kingdom whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations,"³³ may be traced to the ancient maxim, "*salus populi est suprema lex* (the safety of the people is the supreme law)." It is the expression of that instinct of self-preservation inherent in every animate creature, and attributed as essential to all nations, states, and corporations. This extraordinary and dangerous power is institutional and inherent in government; and, as wisely remarked by Chief Justice Shaw, "it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."³⁴ Its summary exercise is always perilous to private right, and often cruelly unjust; as when in emergency, ap-

³³ 4 Bl. Comm. 162.

³⁴ *Commonwealth v. Alger*, 7 Cush. 53 (Mass.).

parent or real, the property of one is sacrificed for the protection of others, or one is deprived of his personal liberty for the supposed safety of the many.

76. **Municipal attribute.**—The police power may be delegated by the state to a municipal corporation as a public function to be exercised within proper limits for all appropriate municipal purposes. The extent of its exercise is always within the legislative control. The police power delegated may be total or partial, or it may be entirely withheld by the legislature from the municipality. It has been decided, however, in some cases that a certain measure of police power is one of the inherent or essential powers of a municipality, for which no legislative grant is necessary. It has been held that a city council cannot bind itself nor its successors by contract to a course of conduct or of municipal inaction derogatory to the police power delegated by the state to the municipality.³⁵

77. **Limitation of power.**—Those powers conferred upon a municipal corporation, which, in their exercise, conduce to protect the public safety and health and promote the comfort and convenience of the citizens and the general welfare of the municipality, manifest the legislative intention in regard to the delegation of the police power to the municipality. The corporation boundaries usually mark the territorial limit for the exercise of the police power by the municipality; but in many instances, for the preservation of the public health especially, the municipality is granted police power beyond its

³⁵ Davenport & Morris v. Richmond City, 81 Va. 636.

boundaries, as, for example, to acquire outside territory for sewerage purposes, and to exercise police power over the same; also to establish quarantine beyond the municipal boundaries and thus protect the citizens from epidemic of any contagious or infectious disease; also to locate and regulate houses of detention and hospitals for infectious and contagious diseases beyond the city limits.

The city may pass reasonable ordinances for the protection of the lives, limbs, health, comfort, and quiet of its citizens; and it has been held that such measure of police power as this is inherent in a municipal corporation, as being essential to the performance of its municipal functions as a public agency of the commonwealth.⁸⁶

78. Summary power.—The police power delegated to the municipality may be exercised either in the ordinary or in a summary manner. The municipality may lawfully employ through its police officers just so much force as is necessary to disperse a mob or quell a riot, even to the extent of maiming or killing persons engaged in the mob or riot, and in case of great conflagration in a city, which cannot otherwise be stopped, the municipality, through its proper authorities, may lawfully, and with impunity, tear down or blow up buildings owned by private citizens in order to arrest the progress of the flames.

When license is required in the exercise of a police power, then only such charge therefor may be made

⁸⁶ The police power of a city extends to the regulation of water rates; *City of Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 61 L. R. A. 888. A city may have a building demolished as unsafe; *O'Rourke v. New Orleans*, 106 La. 313.

as fairly represents the expense incident to the exercise of the power.³⁷ Whether the license is for police or revenue, if not shown in the ordinance requiring it, will appear from the construction of the municipal charter.

The legislature may confer police power upon a municipality over subjects within the provisions of existing state laws. Jurisdiction to enforce state laws is often conferred upon the municipal courts; yet none of these things prevents the state from conferring police power upon municipalities over the same subject-matter.

79. Peace and order.—The preservation of the public peace and order is the primary police function of a municipality. Whatever contention may have arisen over municipal police power, the authority to preserve the peace and order of the municipality, to prevent the exercise of unlawful violence, and to compel citizens and sojourners to abstain from riot, rout, and unlawful assembly, has never been seriously questioned. It is regarded as an inherent municipal power essential to municipal life; and so, whenever the authority has been mooted, it has been uniformly sustained, in some cases even to the extent of the doubtful power of double punishment. Such regulations are indispensable to municipalities in those states which, as a measure of public policy, declare municipal corporations responsible for the public peace and preservation of private property, and make them absolutely liable for damages done by a mob within the corporate boundaries.

³⁷ *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740.

80. **Sanitation.**—The preservation of the health of the population is uniformly recognized as a most important municipal function, and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality. These powers are favored in American courts, and it has been accordingly held that, since a supply of wholesome water is necessary to the comfort and well-being of a city, a municipal contract for the boring of an artesian well is an exercise of the police power. And so, likewise, the city may make such regulations as will insure pure milk or prevent the spread of a deadly disease in a fruit-producing tree. So, also, it may regulate the cultivation of crops, such as rice, within the corporate limits, the cleaning and care of sinks and cesspools, burial of the dead, and the location and operation of slaughter houses. It is competent also for a city to establish quarantine regulations, pesthouses, and places of detention, and to exclude, remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases. It may regulate also the removal of dead animals and garbage, and compel citizens to prepare the same for removal at minimum expense; and generally may suppress nuisance to the public health.³⁸

The power to regulate does not give power to prohibit; and, therefore, a city may not absolutely forbid the sale of meat or second-hand clothing, or other lawful business not in itself necessarily a nuisance. Ordinarily, the municipality must resort to the usual

³⁸ *Ferguson v. Selma*, 43 Ala. 398; *Smith v. Collier*, 118 Ga. 306; *Kennedy v. Phelps*, 10 La. Ann. 227.

process of law to abate a health nuisance; but the state may confer upon it the power of summary abatement in case of emergency.³⁹

81. **Safety.**—The safety of life, limb and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object are within the police power delegated to a municipality. Municipal corporations are, therefore, authorized, in the exercise of police power, to enact such ordinances and employ such necessary means as will insure safety to the private property as well as the persons of its citizens. Fire has been recognized as the greatest municipal peril, and measures to prevent the rise and spread of conflagrations are universal.

A city may, therefore, prescribe fire limits and forbid the erection of wooden buildings therein.⁴⁰ A city may also pass ordinances prescribing the maximum quantity of gunpowder, dynamite, nitroglycerin, hay, excelsior, or other combustible or inflammable material which may be stored in one place or kept in one house in the city. It may also prescribe and enforce the construction of fire escapes on all buildings not strictly private. Ordinances may also be enacted prescribing safe chimneys, flues, and furnaces, and regulating the handling of coals, ashes, and the like; and, indeed, any other reasonable regulation to prevent and extinguish fires.

The supreme exercise of police power by a municipality for public safety is displayed in razing, in case

³⁹ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

⁴⁰ *State v. Johnson*, 114 N. C. 846, 19 S. E. 599.

of emergency, valuable private property to prevent the spread of conflagration. This may be done without incurring any liability whatever to the owner, unless compensation has been provided by statute; the rule at common law being that the state might destroy, though it could not take private property without compensation.⁴¹

Another source of danger to public safety in a city is rapid locomotion in or across the streets thereof. Municipalities have authority to regulate the movement not only of railroad trains, street cars, omnibuses, hacks, automobiles,⁴² but also individuals moving on horseback, bicycles, and other vehicles, and likewise to regulate the movement of water craft in the waters over which they have jurisdiction. Municipal ordinances have been sustained which restrict the running of trains within corporate limits to four miles an hour, require flagmen to be kept at street crossings, and those requiring a conductor on each street car, and many similar ordinances regulating speed and movements within the municipal jurisdiction whereby collisions may be avoided and human life and property saved from needless injury or reckless destruction.

Whatever causes public discomfort or inconvenience or immorality is subject to the police power. It has accordingly been held that a municipality may prohibit public profanity, street preaching, public drunkenness, carrying of concealed weapons, rock blasting, vagrancy, cruelty to animals, Sabbath

⁴¹ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

⁴² *Whitson v. Franklin*, 34 Ind. 392.

breaking, destruction of public trees, steam whistle blowing, and the running at large of animals.

82. **Occupations and amusements.**—The city possesses no power to prohibit a useful business or a harmless amusement; but all manner of occupations and amusements are subject to reasonable regulation by the state or the municipality exercising the delegated police power. A city may prohibit the keeping of a house of ill fame, or the leasing of property for that purpose;⁴³ and so, also, for gambling or liquor selling, if authorized by charter; or, if these practices are not forbidden, the city may adopt and enforce stringent regulations for them. It may prohibit the sale of liquors and wines at places of musical or dramatic entertainment where females act as waiters, and may fix hours for closing and opening saloons, and forbid admission of minors or females; and in general the municipality may enact such ordinances as will tend to prevent such places from degenerating into nuisances or breeding disorder and crime.⁴⁴

Ordinances requiring licenses from peddlers, plumbers, auctioneers, bakers, draymen,⁴⁵ hackmen,⁴⁶ green grocers, pawnbrokers, milk dealers,⁴⁷ billiard saloons, livery stables, showmen, hucksters, lawyers and doctors,⁴⁸ bankers, junk shops, telegraph

⁴³ *Childress v. Nashville*, 3 Sneed 347 (Tenn.).

⁴⁴ *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361.

⁴⁵ *Brooklyn v. Breslin*, 57 N. Y. 591.

⁴⁶ *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045. See *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136.

⁴⁷ *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 44 S. E. 717.

⁴⁸ *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93; *Savannah v. Charlton*, 36 Ga. 460; *Elliott v. Louisville*, 101 Ky. 262, 40 S. W. 690.

companies,⁴⁹ natural gas companies, pharmacists, have been held valid under the police power.

The municipal corporation possesses no inherent power over the liquor traffic, but only the express and implied powers conferred by the charter. Wherever the power of regulation is conferred, the municipality may require a license, may forbid the employment of women in the traffic, may confine sales within reasonable hours and within prescribed territorial limits, and may regulate the traffic by other wholesome restrictions.⁵⁰

83. Markets.—The establishment and regulation of municipal markets are a proper exercise of the police power for the convenience, health, and general welfare of the municipality. A municipal market is a designated place in a town or city with convenient fixtures for the sale of provisions and articles of daily consumption, with proper regulations and officers, where all persons may lawfully go for the purpose of buying or selling.

In America the establishment and regulation of markets is generally granted by charter; and after much contention it has been generally decided that the city may prohibit the sale of fresh meat, vegetables, and other provisions elsewhere than in the public market, upon the ground, as stated in a leading Louisiana case, that "the privilege of keeping a private market is subordinate to the right existing

⁴⁹ *Allentown v. Western Union Tel. Co.*, 148 Pa. 117, 33 Am. St. Rep. 820; *Hodges v. Western Union Tel. Co.*, 72 Miss. 910, 29 L. R. A. 770.

⁵⁰ *Giozza v. Tiernan*, 148 U. S. 657; *Decie v. Brown*, 167 Mass. 290; *Provo City v. Shurtliff*, 4 Utah 15, 5 Pac. 302; *Metcaif v. State*, 76 Ga. 308; *Ex Parte Hayes*, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.

in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity."⁵¹

84. **Enforcing regulations.**—Violations of police regulations are usually punished by a court proceeding in personam for the recovery or enforcement of the affixed penalty, but in many cases the police power is enforced in rem in a summary manner. For example, a city council has power to confer upon the board of health authority to demolish a house infected with smallpox as a nuisance dangerous to the public health.⁵² So, also, a city may order a wooden house to be torn down which is built within the fire limits in defiance of the ordinance forbidding it;⁵³ and, as we have seen, the municipal corporation, without either statute or ordinance, may cause a private building to be demolished to stop conflagration.

A ferocious dog, or any other kind of animal *damage feasant* in a municipality, may be killed, if necessary; also a vagrant dog, unmuzzled, and addicted to biting, though doing no harm at the time, may be summarily killed as a measure of precaution.⁵⁴ In some states, too, the police are authorized to kill all unlicensed dogs wheresoever found. Similar to this is the summary arrest and confinement by the police in the lockup of persons of the drunk and disorderly class, and the use of force, even to mayhem

⁵¹ *City of New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563.

⁵² *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

⁵³ *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608.

⁵⁴ *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175.

or death, if necessary, to disperse a mob or quell a riot.⁵⁵

85. **Streets.**—"Street" is a generic term usually employed to describe any public highway, whether improved or unimproved, lawfully established and opened in a municipality to the public use for travel and traffic. In its legal acceptation, this word embraces not only streets, but also avenues and alleys. The term is used to describe any public road inside municipal boundaries, but does not properly embrace rural or suburban roads. Whenever duly established and opened, such a road becomes a street, whether it is worked upon and improved, or left in its natural state. It is dedicated to the public and accepted and held by the public for the use of trade and travel, and may not be perverted to other uses.⁵⁶

86. **Legislative control.**—The supreme power over streets as public highways for the public use is inherent in the state. The state holds all public powers and utilities in trust for the public welfare, including those within as well as those beyond municipal boundaries. Within constitutional limitations, it may determine when, where, and how streets, or other public highways, shall be opened, graded, improved, and regulated; and, also, when and how vacated or closed.⁵⁷

The legislative control over streets may be, and

⁵⁵ *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218.

⁵⁶ *Dexter v. Tree*, 117 Ill. 532; *Townsend v. Epstein*, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

⁵⁷ *Peters v. St. Louis*, 226 Mo. 62, LEADING ILLUSTRATIVE CASES.

generally is, delegated to the municipality, and the power is thus conferred upon it to open, grade, improve, regulate, and close its own streets.

The grant, usually expressed in general terms, is to the city to lay out, open, grade, and otherwise improve streets and keep them in repair; or to have power over its streets; or to have the care, supervision, and control of its streets. These general grants of authority by the state over the city's own streets, to its duly authorized general agent, to do whatever the state might do in controlling them, are held to confer plenary powers upon the municipality.

87. Dedication and acceptance.—Dedication of property for street uses may be made by any legal or equitable owner, either in writing or orally, or by conduct or acquiescence in public use, such as will suffice to estop claim to the contrary.

A dedication consists of both act and intention, and may be either express or implied: express when the owner, either in writing or by parol, declares his intention to donate and surrender the property to the use of the public; implied, as when this intention is signified by a public platting of property and lots with open spaces apparently for street uses, or when the public for a long time uses the property for a street with the knowledge of the owner, and without his objection.⁵⁸

88. Use of streets.—The primary use for which streets are dedicated is free and unobstructed passage over them; but this use may be modified or tem-

⁵⁸ *Cohoes v. Delaware, etc., Canal Co.*, 134 N. Y. 397, LEADING ILLUSTRATIVE CASES.

porarily obstructed under municipal authority for other necessary and appropriate municipal purposes, not inconsistent with, or destructive of, the primary use of public travel.

Such obstruction must be reasonable, and not so long continued as to prove a nuisance. The municipal license will not protect the licensee from liability for damages to any abutting owner suffering special injury from the obstruction. And for the protection of the public the city may require that the owner or contractor erecting a building shall build a covered passway over the sidewalk.

The municipality may also authorize the use of streets for telegraph, telephone, and electric service, for street and commercial railways, and may allow below the surface the laying of gas, water, and sewer mains and pipes, and the construction of subways. Poles may not be planted or wires strung for electric use in the streets without express consent of the municipality; and it may not grant this privilege unless thereunto expressly authorized.

The municipality having control of its streets below as well as above the surface, may, therefore, grant to public service corporations the right to lay pipes and mains and to construct subways for all proper municipal purposes. These may include not only pipes and mains for water, gas, and sewage, in case the city has no public system, but may also include conduits for electric wires and subways for railroads.

If electric wires become so numerous as to impair the public safety, the municipality may require that

they shall be taken off the streets and placed below the surface.

The power of a municipality to authorize the construction of street railways in its streets has been thoroughly established and uniformly recognized; but the city may impose such conditions as the safety of the public or the welfare of the municipality may require, not only at the time of granting the privilege, but also thereafter, in the exercise of the police powers; and for a breach of these conditions, franchises may be declared forfeited by the court.

Possessing paramount power over streets the state may vacate them, or authorize their vacation by the municipality; but the vacation must be for public, not private, benefit. Abutters have peculiar rights in streets, and may not only stand surely upon "due process of law" for protection, but may also insist upon the constitutional right to compensation for the appropriation of their easement of access to the public use.

89. **Abutting owners.**—An abutting owner shares in all the rights of the general public, and, in addition thereto, has such special rights as arise from his property abutting on the street. Among these is the right of free and unimpeded ingress and egress to and from his property, even though he may thereby cause temporary inconvenience to the public in general. The convenient use of property, in urban communities, is dependent upon connections with sewer, water and gas pipes, which may not be denied.

An abutting owner has at common law no right to lateral support of street soil, and none can be acquired

by prescription or lapse of time; so, though the street grade may be changed so that his fences fall, he has no action therefor.

If additional burdens are imposed upon a street, abutting owners are entitled to compensation, if damaged; and this notwithstanding the fee is in the public, or the municipality for public use. They may recover damages for the construction of a common traffic railroad, but not for a mere street railway, whether operated by cable, electric, or horse power.

The abutter has no right to project his buildings, or any part thereof or attachment thereto, over the street line, without municipal consent; but a city may permit abutters to extend balconies, bay windows, awnings, or signs into streets.

90. **Sewers.**—The construction of sewers is an inherent municipal function for sanitary purposes, and may be imperatively imposed upon a municipality by the state.

Unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of sewers, and also the nature and cost of the system. This function is legislative, and the municipality cannot be held liable for failure to exercise it, and thus provide a system of its own, or for mistake made in the choice of the systems offered.

The municipality may, of course, use the streets for the construction of a sewerage system, and it has been held that it has also the power of eminent domain over other property for this purpose.

It is competent for the city to assess the expense of

building a sewerage system for a certain street against the abutting property, and to require all persons residing on the street to connect with the sewer. No property-owner can be prevented from tapping a municipal sewer.

A sewer being once completed, it is the imperative municipal duty to see that it is properly cared for; and for failure to perform this function the municipality may become liable in damages.

91. Parks.—Public parks and squares are proper objects of municipal concern, as means for the promotion of public health and comfort; and property may be acquired and held by a municipality for these recognized purposes.

Public parks, such as Hyde Park and Bois de Boulogne, and public squares, such as Trafalgar Square and the Place de la Concorde, have long been recognized and maintained as municipal attractions and conveniences for the inhabitants and sojourners of a city. Recognizing these as an important public use, the states have generally conferred upon municipalities the sovereign power of eminent domain for the purpose of condemning property for the public use in parks and squares, and have often authorized this to be done beyond the limits of the municipal corporation.

But though parks and squares are recognized as a public use, they are matters of municipal rather than governmental concern, and their establishment is within the discretion of the municipality.

It is obvious that the city may accept land dedicated for public parks and squares, and appropriate

money out of the municipal treasury for its improvement. A city cannot authorize the erection of any private building in a public square or park—not even a railway station or depot—and a lease of a park for private use is void. Ways may be opened through a park for pleasure driving and riding, like Rotten Row in Hyde Park; but they may not be used for traffic purposes.

The city may permit and provide for the erection of monuments, fountains, art galleries, and zoological buildings, and may pass ordinances for the protection of animals and birds therein.

92. Public buildings.—Public buildings are essential for municipal purposes, and the power to acquire land therefor, and erect and maintain necessary buildings thereon, is inherent in the municipal corporation. The city council possesses inherent power to provide appropriate room for its own meeting, and for the transaction of the necessary municipal business. Also, it must provide a proper place for the detention of municipal prisoners, and the proper housing and protection of its fire apparatus. And in general the municipality has implied power to erect and maintain any necessary public building.

CHAPTER VI.

TORTS.

93. **Corporate liability.**—A municipal corporation may be liable to a civil action for a wrong committed or permitted by it causing private injury.

A municipality, being created by the state and endowed with certain functions for the public welfare, must perform those functions, or suffer indictment for its nonfeasance or misfeasance. Also, being a member of society, and empowered not only to exercise governmental functions, but also to own property and to deal with other corporations and with natural persons upon terms of equality, the municipality must respect the law not only in its contracts, but also in its non-contract relations with others; and where anyone suffers an injury by the neglect of the municipality to discharge any absolute duty, such person has an action against the municipality for the redress of the injury.⁵⁹

94. **Governmental duties.**—No action lies at common law against a municipal corporation for an injury resulting from the performance or non-performance by it of a purely governmental duty. In its strictly governmental character a municipality closely resembles a quasi-corporation, and in this aspect the law for it is practically the same as for a

⁵⁹ *Rowland v. Kalamazoo Supt. of Poor*, 49 Mich. 553, 14 N. W. 494; *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185.

quasi-corporation as to the reason and extent of its exemption from liability for injuries suffered by others. It is performing a public function—discharging a governmental duty of the state for the public welfare; and out of this no action can arise unless given by statute.⁶⁰

Prominent among these governmental functions are: (1) The preservation of the public peace; (2) the preservation of the public health; (3) punishment of criminals; (4) preventing destruction by fire; (5) furnishing public education; (6) providing for the poor. Accordingly, a city is not liable for negligence or misconduct of its police officers,⁶¹ for they are state officers, rather than municipal; it is not liable for failure to disperse a mob or suppress a riot. Nor is a city liable for the misconduct of its health department, or any of its health officers, since sanitation is a public, rather than a municipal, duty. And, since the maintenance of public peace and enforcement of good order may require the punishment of evildoers by a municipality, it is the general doctrine that no action will lie against the corporation for the negligence or misconduct of its officers in the confinement or punishment of criminals. The courts agree that it is a governmental duty to stop conflagrations, and that a municipality cannot be held liable for either the negligence or misconduct of its fire department, or any member thereof; also, that a city cannot be

⁶⁰ *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505, LEADING ILLUSTRATIVE CASES.

⁶¹ *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; *Whitfield v. Paris*, 84 Tex. 431, 15 L. R. A. 783, 31 Am. St. Rep. 69; *Easterly v. Irwin*, 99 Iowa 694, 68 N. W. 909.

held liable for the failure to provide adequate fire apparatus or sufficient water to extinguish fire. So, also, it is held that no action will lie against a municipality for injury resulting from the negligence or misconduct of any of its agents or employees in connection with its public school buildings.

No private action will lie against the city either for failure to enforce its own laws and ordinances,⁶² or from its action or non-action in any other matter resting in the discretion of the corporation as a governmental agency; and so damages have been refused for injuries resulting from forbidden fireworks,⁶³ from a public nuisance, for failure to build sewers or drains, from the adoption of a defective plan of sewerage, and from doing or failing to do any act not ministerial, but legislative or judicial in character.

95. Municipal duties.—A municipality, in the exercise of its purely municipal functions, is subject to the same rules of liability for torts as a private corporation.⁶⁴

To illustrate, if a town or city maintains a structure which is a nuisance and causes special damage to private parties, or if in the performance of an authorized act the municipality invades any property right, the corporation is liable.

In an early New York case,⁶⁵ which has been quoted with approval both in England and America,

⁶² *Fowle v. Alexandria*, 3 Pet. 398 (U. S.).

⁶³ But they were allowed in the leading case of *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, 36 Am. St. Rep. 664, 34 N. E. 727.

⁶⁴ *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, *LEADING ILLUSTRATIVE CASES*.

⁶⁵ *Bailey v. Mayor, etc., of New York*, 3 Hill 531 (N. Y.), 38 Am. Dec. 669, *LEADING ILLUSTRATIVE CASES*.

the doctrine of liability of a municipality in regard to its quasi-private real property was thus stated: "The citizen and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality. Neither is the privileged owner, and each must fulfill the same duties in respect to the other. * * * If the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." This rule has been applied to a poor farm kept by a municipality, and also to a city cemetery yielding profit to the municipality. The same rule has also been applied to a municipality owning or controlling wharves, docks, and piers, and also where the city supplies water or light for compensation; and so where it maintains a public market. And this rule seems to apply to any business undertaken by a municipality under its charter powers. It is then a corporation organized for profit, and justly subject to the same rules as a private corporation.

96. Municipal performance of governmental duty.—A municipality, when charged in its corporate character with the performance of a municipal function in regard to governmental affairs, is, by the preponderance of judicial opinion, civilly liable for injuries resulting from misfeasance or nonfeasance of such municipal duty.⁶⁶

⁶⁶ *Mills v. Brooklyn*, 32 N. Y. 489, LEADING ILLUSTRATIVE CASES.

The prevailing view of the courts in America is that for a failure to discharge the duty to keep streets in repair there is an implied common law liability for resulting injury resting upon every chartered municipality. After long contention in the federal courts this doctrine was at last authoritatively adopted by the Supreme Court of the United States in the leading case of *Barnes v. District of Columbia*;⁶⁷ and this view is also maintained in the states of Alabama, Colorado, the Dakotas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. Under the lead of Massachusetts, where this subject has been often and ably considered,⁶⁸ the following states have adopted the contrary view: Arkansas, California, Connecticut, Maine, Michigan, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Wisconsin. The Supreme Court of the United States recognizes its duty to follow the decisions of the highest court of each state in regard to municipal liability for tort therein.⁶⁹

97. Reasonable care of streets.—The common law requires every municipal corporation to exercise reasonable care to make and keep its streets safe for all ordinary uses for which they are opened to the public. A municipality is not an insurer of public safety

⁶⁷ 91 U. S. 540, 23 L. Ed. 440.

⁶⁸ *Hill v. Boston*, 122 Mass. 344, 23 Am. Dec. 332.

⁶⁹ *City of Detroit v. Osborne*, 135 U. S. 492.

on its streets. It owes the public only the duty of reasonable diligence to keep its streets in such condition that the public, by exercising like diligence, may use them for all lawful purposes with reasonable security. A failure to perform this duty will render a municipality liable for the damage occasioned thereby.

For an injury occurring to any person from the apparent neglect of the municipality to keep its streets in repair, two defenses are open, which are generally recognized as sufficient: (1) That the city had no notice, actual or implied, of the existing defect; (2) the lack of any corporate fund and of any power to obtain one applicable to repairs has also been recognized as a good defense.

What is reasonable care is a question of fact depending upon the circumstances of each particular case. The degree of repair of a street is a matter of municipal discretion. The standard of repair may well be different in various localities. But it has been held that the municipality must use such care as will protect not only the busy traveler and pedestrian, but also the playing child and even the idle loafer.⁷⁰

98. Obstructions.—Reasonable care of the streets also requires of the municipality the removal from them of unlawful obstructions and the signaling of dangerous ones.

⁷⁰ *City of Waverly v. Reesor*, 93 Ill. App. 649; *City of Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528 (where the city of Omaha was held liable for the death of a boy who fell through a section of a sidewalk which he was using as a raft on a pond of water that had accumulated over a street and adjacent private property because of the city's negligence in constructing a storm sewer).

The temporary and partial obstruction of a street may be permitted by the city when necessary for building, removing, improving, or commerce; but such work must obviously be performed with dispatch and care, and municipal consent must be obtained for the obstruction. Whenever and wherever it is permitted, it is a municipal duty to give reasonable warning to the public, both day and night, of the presence of danger, to the end that it may be avoided. Hitching posts, electric poles, stepping stones, and hydrants are not regarded as unlawful obstructions when placed at the curbstone or margin of the street, so as not to render the way unsafe; but such things placed either with or without municipal consent within the portion of the street commonly used either for riding, driving, or walking, and not properly guarded or signaled, will give action against the municipality to one injured thereby. Recoveries against a municipality have also been sustained because of its failure to remove or properly signal as obstructions to the street an ash pile, a motor, a steam roller, machinery, a furnace, a tent, building material, a hydrant, logs, rocks and stones, and also dangerous holes and excavations in or near the street, and objects naturally tending to frighten horses ordinarily gentle.⁷¹

99. Sidewalks.—Sidewalks under municipal control are objects of the same reasonable municipal care as other parts of the street, and an action will

⁷¹ Even where a horse of ordinary gentleness merely shies, so that the driver does not lose control of him, but is injured by coming in contact with an obstruction in the street, the city is liable; *Burnes v. St. Joseph*, 91 Mo. App. 489.

lie for injuries resulting from nonfeasance or misfeasance of this municipal duty. It is immaterial whether the municipality has built the sidewalk. Being a part of the street, it is under municipal control, and the corporation will be liable for neglecting to exercise ordinary care to keep it reasonably safe. The duty is an active one, beginning with the construction of the walk and continuing thenceforth as long as it remains under municipal control. If it be the duty of the abutter to make repairs, the municipality is not relieved from liability by notice given to the abutter. The walk must be made safe within a reasonable time, or the municipality will be liable for damages occurring from its being out of repair.

Hatchways and similar entrances from sidewalks to cellars are necessities in urban life, but the city must take care that such things do not become dangerous to pedestrians. If basement steps are necessary and permitted in a sidewalk, they must be guarded with suitable railing; and the doors or lids of hatchways or coal chutes must be safe and strong so as to protect pedestrians from danger. The municipal duty of reasonable care applies equally to objects above the sidewalk, such as signboards, poles, and awnings.

Ice and snow. The presence of ice and snow upon streets and sidewalks requires only reasonable care. Statutes have been passed in the New England States prescribing the measure of municipal duty; but such statutes, of course, are of local application only, and are not enacted in the Southern States. The only rule of general application, therefore, must be that

of reasonable care in view of climatic and other conditions.⁷²

100. **Bridges and viaducts.**—All viaducts and bridges within a municipality are parts of streets, and objects of the same degree of municipal care. Unless required by mandatory statute, the construction of a bridge by a municipality is within its discretion; and, the location of a bridge being a governmental function, the municipality is not liable at common law for injury resulting therefrom. A municipal corporation is not liable for injuries resulting from the negligence or erroneous judgment of its officers or agents in the performance of, or omission to perform, duties which are purely discretionary,⁷³ such as opening or closing a street, changing a grade, locating a crossing, or even suspending a general regulation for the temporary convenience or pleasure of a portion of its people.

But after the discretionary function of location has been performed and the municipality enters upon the business of construction, it enters the field of ministerial functions, and may become liable for failure to exercise reasonable care to place proper guards and railings around the bridge approaches during the construction, and also on the approaches and bridge itself after it is completed, so as to protect persons upon the bridge exercising ordinary care. It must use due care to erect and maintain a reasonably safe structure, and generally is liable for failure to per-

⁷² *Mauch Chunk v. Kline*, 100 Pa. 119, 45 Am. Rep. 364.

⁷³ *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

form, or for negligent performance of, its duty in regard to bridges, under the same rules as are applicable to streets. This includes the duty of reasonable inspection and notice of danger; and for failure to exercise these duties municipalities have been held liable for defect in the floor, in the railings of a bridge, and for failure to close or warn the public of a dangerous bridge.

101. Drains and sewers.—A municipality may also be liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the construction and maintenance of its drains and sewers. It is well settled that in deciding to build sewers and in choosing a plan the municipality is exercising governmental discretion, and therefore incurs no liability for the negligence or mistakes of its agents; but a municipality is liable for damages resulting from its neglect to discharge properly its ministerial duty to exercise reasonable care in the construction and maintenance of its sewers. Even the New England States, and others, denying municipal liability for defective streets, generally recognize and enforce this rule with regard to sewers. The true ground of responsibility for negligence in the care of sewers seems to be the same as in the care of highways, namely, the corporation has neglected its municipal duty to exercise reasonable diligence in the care and management of property under its control. Municipal ownership is not essential to liability; municipal control will be sufficient. And it has been held that when a sewer runs partly through private and partly through municipal

property the corporation is liable for the entire damage done by overflow at its outlet; also that a municipality is liable for damages sustained by individual owners from the flooding of their premises by drains or sewers; and from the depositing of sewage upon their lands, though this be a necessary result of the plan adopted. So, also, damages may be recovered by private action for the pollution of a stream by sewage so as to render the water unfit for use by the riparian owner or occupier; and in some cases the municipality has been enjoined from emptying its sewage into a running stream, whereby a public nuisance was created.

102. **Respondeat superior.**—The liability of the municipal corporation in most cases of tort rests upon the doctrine of the common law that the master is liable for the wrongs done by the servant when acting within the scope of his employment. Obviously, there can be no liability for tort unless there has been a violation of some municipal duty; nor can a corporation be held liable for the acts of officers whom it does not control. But the corporation may be liable for the conduct of officers not appointed by it, but by the state for it.⁷⁴ “For the acts of an independent officer, whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of respondeat superior, for the relation of master and servant does not exist. Such officers are quasi-civil officers of the government, even though appointed by the corporation. But an excep-

⁷⁴ *Bailey v. Mayor, etc., of New York*, 3 Hill 531 (N. Y.), 38 Am. Dec. 669, LEADING ILLUSTRATIVE CASES.

tion to this rule exists when the corporation is under an absolute duty to perform the acts which are devolved upon such officers, or when the corporation, as such, derives an immediate profit and advantage therefrom."⁷⁵

103. **Ultra vires.**—A municipal corporation is not civilly liable for damages suffered by individuals in person or property which are caused by the tortious acts of municipal agents or officers assuming to represent it in matters wholly beyond its powers.

A municipal corporation cannot confer upon its agents or officers lawful authority to represent it beyond the scope of its charter powers. For the malfeasance of agents or officers of the corporation in assuming to do acts which are entirely beyond the municipal powers and purposes, and cannot, therefore, be lawfully authorized by the municipality, the corporation cannot be held liable in damages to persons suffering injuries therefrom. This logical doctrine, based upon elementary principles of the common law, received general, if not universal, recognition in America by the concurrent decisions of the courts for almost a century.

Salt Lake City Case. The stability of this doctrine of the law is supposed to be shaken by the decision of the Supreme Court of the United States in the unique case of *Salt Lake City v. Hollister*,⁷⁶ wherein Mr. Justice Miller, in delivering the opinion of the court, said: "The truth is that, with the great increase in corporations in very recent times, and in

⁷⁵ Wood, *Master and Servant*, § 463.

⁷⁶ 118 U. S. 256.

their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers, who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

An examination of this case shows the foregoing language of Mr. Justice Miller to be an obiter dictum. Salt Lake City, having erected a distillery, proceeded without authority to engage in the business of distilling spirits, and while so doing, in violation of the United States revenue laws, made fraudulent returns of the quantity of spirits produced. Its fraud was detected, and the city, to save its property, paid the tax under protest, and then brought action against the collector to recover the amount so paid. The ground of its action was that the business of distilling spirits by Salt Lake City was *ultra vires*. The very impudence of the contention provoked the court to pungent ridicule of the plaintiff's action, and naturally strong language was used in refuting its absurd contention and denying its demand. But the question in the case was not whether a municipality is liable in a civil action to an individual injured by the tortious acts of its agents or officers *ultra vires*, but only whether it could recover from the government a sum of money paid under protest to avoid seizure of its property for a lawful tax and pen-

alty. The gist of the decision is found in the following excerpt from the opinion: "A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally; and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted."

The fundamental rules of law upon which a person or corporation becomes liable for a tax are so widely different from those which declare liability for a tort that even these cogent words of Justice Miller, used argumentatively in the decision of a revenue case, are not likely to unsettle the logical rule as to torts to private individuals established by the concurrent decisions of courts of last resort through scores of years in the United States.

CHAPTER VII.

DEBTS, FUNDS AND TAXES.

104. **Municipal indebtedness.**—Within the scope of its charter powers, a municipality, in the exercise of corporate functions and transaction of municipal affairs, may incur indebtedness to any extent not forbidden by law.

Clothed with the power of eminent domain, and the inherent power to contract, and required to exercise police powers (some of these at its peril), a municipality must necessarily incur large expense, the amount of which, under the American rules of local self-government, properly rests in the discretion of the municipality; and, in the absence of constitutional or statutory limitations, this discretion as to amount is unbounded.⁷⁷ The law is, however, imperative that to constitute a valid indebtedness, the expenditure must be incurred within charter powers and for municipal purposes.

105. **Debt limitation.**—Limitation to municipal indebtedness may be fixed either by statute or constitution, beyond which no obligation can be incurred by the municipality.

The limit is usually fixed at a certain per cent. or aliquot part of the total assessed value of real estate, or real and personal property, in the corporate

⁷⁷ *Coggeshall v. Des Moines*, 78 Iowa 235, 41 N. W. 617; *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557.

limits. The form of constitutional inhibition is usually such as to prevent either the legislature or the municipality from passing the constitutional limit; in which case all indebtedness, howsoever incurred, beyond this limitation is void. Limitation may also be fixed in the charter, or by general statute, which cannot be transgressed by the municipality; but such boundary when fixed by the legislature may likewise be transgressed by the same body, and indebtedness beyond the statutory limit may be imposed upon the municipality by the legislature.

The recognized classes of municipal indebtedness are two, (1) bonded and (2) current. The weight of authority favors such strict construction of these statutory and constitutional prohibitions as will include both classes of debts, and thereby protect the citizens from overburdensome taxation.⁷⁸

106. **Municipal bonds.**—Municipal bonds are now generally understood to mean negotiable bonds issued by a municipality as security for its indebtedness. Municipal bonds are not necessarily negotiable. But the term “municipal bonds” in modern parlance imports negotiability. They are generally issued as security for a loan of money to the municipality. But sometimes they are used to subsidize some undertaking of advantage to the municipality, such as a railroad, gas, water, or electric company.

Express power to incur indebtedness by borrowing money on the municipal credit may be conferred upon a municipal corporation either by charter or by gen-

⁷⁸ *Laporte v. Gamewell Fire Alarm Tel. Co.*, 146 Ind. 466, 35 L. R. A. 686, 58 Am. St. Rep. 359.

eral law. Like power may also be implied as appropriate and necessary for the proper and efficient exercise of the municipal powers expressly conferred upon the corporation. Lacking express or implied power for such purposes, a municipality does not possess inherent power to incur municipal indebtedness by borrowing money on municipal credit.

Until the era of municipal extravagance had come to America, municipal corporations had been wont to borrow money, and give their notes or bonds therefor, without serious doubt or question as to the existence or source of such power. But upon recent challenge it has been declared in the Supreme Court of the United States that the power to borrow money is not an incidental and necessary power of a municipal corporation; and that to create a valid indebtedness for money borrowed by a municipality there must exist either express authority, or the same must be clearly implied from granted powers.⁷⁹ To this view has been added the great weight of the opinion of Judge Dillon,⁸⁰ and the concurrence of some of the state supreme courts, and the preponderance of judicial opinion is now against the inherent power of a municipality to borrow money.

107. Power to issue bonds.—Authority to issue municipal bonds, though not inherent in a municipality, may be expressly conferred by the legislature, or may be implied as necessary to the exercise of the express powers. This power to issue negotiable paper will be implied from the express power to bor-

⁷⁹ *Mayor of Nashville v. Ray*, 19 Wall. 468 (U. S.), 22 L. Ed. 164.

⁸⁰ 1 Dill. Mun. Corp., § 125.

row money; but the courts have been generally averse to any such implication where the bonds are to be used as municipal aid to the construction of a railroad, either by subscription to stock or purchase of bonds. Usually the statute authorizing the issuance of such bonds provides for a submission of the question to popular vote, and authorizes their issuance only when favored by a majority of the electors or taxpayers of the municipality.

Municipal bonds, being generally issued for the purpose of obtaining a loan of money on favorable terms, are made payable to bearer and pass by delivery. They are therefore held free from all equities which might exist in favor of the corporation, and the only defense open to the municipality is want of authority for their issuance. Unauthorized bonds are void, and cannot be validated.

Estoppel cannot save them even in the hands of a bona fide holder for value without notice of the want of power.

When the want of authority is due to the illegal exercise of possible authority (as issuing bonds without an indispensable popular vote favoring it), false recitals in the face of the bond that the conditions have been complied with estop the municipality to deny compliance when sued by a bona fide holder. Such irregularities may be cured by express ratification or long continued acquiescence and recognition.

108. **Municipal warrants.**—The current indebtedness of the municipality is usually evidenced by the warrants or orders, which the municipality has the inherent power to issue through its officers. Mu-

municipal orders or warrants are informal checks by one municipal officer upon another for the payment of a certain sum of money. These warrants are usually not negotiable, and do not bear interest. They are not intended to be used as currency, though they are assignable; but in the hands of any person the city is entitled to all equities against the original payee.

109. **Funds—Creditors.**—Municipal revenues are usually divided into funds which represent the various sums of money appropriated by the council for the payment of specified kinds of indebtedness; e. g., a school fund, interest fund, street fund, sinking fund, and the like. The warrants of the municipality are usually drawn upon some special fund, and are to be paid out of that fund in the order in which they are presented and accepted by the disbursing officer. If the fund be exhausted, such warrant is not then payable out of other money in the municipal treasury, but may be payable out of the same fund the following year.

Creditors may by contract obtain a vested interest in municipal funds so that the same cannot be taken from them either by municipal or legislative action. It often happens in the administration of municipal affairs that contractors doing work of improvement for the municipality have been promised compensation out of certain municipal funds; or that a loan of money has been obtained upon the credit of some specific municipal fund; or that creditors of the municipality have been induced to refund their existing obligations at a lower rate of interest, or even

to reduce the principal of the debt, upon guaranty of payment out of some specific source of municipal revenue. In all such cases, unless the fund pledged is strictly governmental in its nature, so as to be incapable of being pledged, the creditor obtains a vested interest in the fund, which is protected by the contract clause of the Federal Constitution; and his right cannot be impaired by subsequent legislation, either by the state or the municipality. Sinking funds have been held to be peculiarly within the protection of this constitutional provision, and any legislation void which tends to impair the creditor's contractual security.⁸¹

110. **Expenses.**—Municipal expenses include all such items as are incidental to the proper exercise of corporate functions in administering the government of the municipality, and, if within the scope of the municipal powers, are within the discretion of the governing body. For example, a stenographer's fees for reporting, under the direction of the city attorney, the trial of a case against a police officer, is a proper item of municipal expense, though the city was not a party to the suit, since such matters must be left to the discretion of the city attorney, and he was acting within the apparent scope of his authority.⁸² But the discretion vested in the council will not validate a claim for items of expenditure obviously not municipal, such as giving banquets, providing entertainment for guests,⁸³ buying

⁸¹ *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

⁸² *City of Chicago v. Williams*, 80 Ill. App. 33.

⁸³ *Black v. Detroit*, 119 Mich. 571.

military uniforms, expenses of delegates to a municipal convention, and the like.

111. **Budget.**—A classified statement of annual appropriation of municipal revenues, commonly called a budget, is required in many states, as the measure of lawful municipal expenditures during the year. The object of this budget is to ensure an orderly, systematic, and economical administration of municipal affairs, and the executive officers of the municipality are required to conform their operations to this budget, and limit their expenditures to the sums appropriated to the various departments or kinds of municipal work.⁸⁴ It has been held that unwarranted expenditures for municipal objects may be ratified by the council, and a claim therefor be thus validated.⁸⁵

112. **Municipal claims—Appropriation.**—Claims against a municipality *ex contractu* do not become actionable until after due and regular presentation and demand for payment, and refusal by the proper officer. In the management of municipal affairs some officer is intrusted with the duty of auditing claims; and when the claims are approved, or an accord has been reached, warrants are drawn for payment upon the municipal treasury. After such warrant has been presented and payment refused, and not before, the claimant has a right of action thereon;

⁸⁴ The amount placed on the budget for the annual expenses of a municipal corporation when collected by taxes levied therefor must be applied to the purposes specified in the budget; *Badger v. New Orleans*, 49 La. Ann. 804, 37 L. R. A. 540.

⁸⁵ *Barrett v. Mobile*, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721.

but the warrant is not conclusive upon either party. The municipality may defend against the warrant upon the ground that the claim was ultra vires, fraudulent, or unfounded; and the claimant, at any time before assigning or receiving payment of the warrant, may waive this acknowledgment of indebtedness and sue the municipality upon his original claim.

Appropriation, being the authoritative application by the council of municipal revenues to a distinct object or definite purpose, fixes the rule of action governing all officers in the handling and disbursement of the municipal revenues.

No discretion is left to the financial officer in disbursing the municipal revenues; the funds appropriated to a specific object must be applied solely to it. Whatever be the statute or ordinance of appropriation, the disbursing officer must act in obedience to it.

113. Taxing power.—Taxation is an attribute of sovereignty. The power is not an essential function of a municipal corporation, but may be delegated to it by the state, either expressly or by necessary implication. Taxation is inherent in the state, as an essential attribute of sovereignty. It is primarily a legislative function, all taxation being based upon legislative authority; but, as stated before, the legislature may delegate this power to the municipality. This may be granted in express terms, or it may be implied as necessary for the exercise of other powers expressly granted. Thus, if a municipality is expressly authorized to borrow money, the power to levy taxes to raise revenue to meet the obligation is necessarily implied.

The power of municipal taxation is subject to the sovereign will, and may be granted, enlarged, abridged, or revoked when and as the legislature shall deem best. The legislature, at the creation of the corporation, may grant or withhold this power, as to it shall seem best. It may give a small or large measure of the power; and after the original grant it may enlarge, curtail, or wholly revoke it, subject only to the vested rights of creditors.

114. Public purpose only.—Taxes may be levied by a municipality for public purposes only. The legislature is the exclusive judge as to the rate of taxation to be imposed upon the state by itself; and such measure of taxing power as it possesses it may confer upon a municipality. If the power is perverted to private purposes, it is no longer taxation; it is extortion. And it matters not whether the malversation is in small or in large sums; it is an abuse of sovereign power, amounting to robbery under the forms of law. The touchstone of all taxation, municipal and state, in our country, is not, then, the rate of the levy, but the object of the appropriation.

115. Judicial question.—Whether the purpose is public or private is for ultimate decision by the courts. The facts of any case being conceded or proven, it is then for the courts to declare the law; and, while the common council of a municipality are empowered in the first instance to express their view of the nature of the tax, their opinion is not conclusive, but may be subjected to the ultimate test of judicial determination. It has been held that public

moneys in a town treasury cannot be distributed among "the inhabitants of the town according to families."⁸⁶ Also there is a decision that the credit of a town cannot be loaned to a manufacturing firm to induce the location of the manufacturing plant in the town.⁸⁷ Furthermore, it has been decided that a tax on a foreign insurance company for the benefit of disabled firemen was void.

On the same principle the proposed issuance of \$20,000,000 worth of bonds by the city of Boston to raise money to loan to lot-owners for the purpose of rebuilding in the burnt district in the city after the great fire of 1872 was declared to be null and void.⁸⁸ The same ruling had been previously made upon a similar act of the legislature of South Carolina in regard to the city of Charleston after the fire of 1866.⁸⁹

116. What are public purposes.—A general concurrence of judicial opinion includes among public purposes of municipalities: (1) The administration of justice; (2) the preservation of peace and order; (3) the protection of property; (4) the facilitation of locomotion and transportation; (5) the preservation of the public health; (6) the support of public education; (7) the promotion of public comfort; (8) the care of the helpless; (9) the reward of civic fidelity and heroism.

The question of what is a public and what a private purpose is to be found fully expressed in the

⁸⁶ *Hooper v. Emery*, 14 Me. 375.

⁸⁷ *City of Parkersburg v. Brown*, 106 U. S. 487.

⁸⁸ *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

⁸⁹ *Feldman & Co. v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

opinion of Judge Black in the celebrated case of *Sharpless v. City of Philadelphia*,⁹⁰ which may be thus digested:

“Taxes may be imposed for roads of all kinds, canals, and bridges, that there may be facilities for transportation of freight and for travel; for public schools or colleges, that the people may be educated; for public libraries, that their means of improvement may be increased; for the poor, the dumb, the blind, the insane, lest they suffer from want; for the police of the state, in regulations for the preservation of health or the detection of crime; for courts of law, that individual rights may be protected and enforced, and that crime, when detected, may receive its fitting punishment; for the preservation of peace and the protection of the country from foreign enemies; to aid, encourage, and stimulate commerce, domestic and foreign, by the establishment of mints, postal system, and maintaining navies to keep open the highway of nations; to encourage citizens in the defense of their country by suitable rewards and mementos for past services in times of war, or by bounties for enlistment for future services; and for the promotion of the arts and sciences. For all these matters taxes may be imposed. The purpose is public. The object is governmental. The money raised and property purchased are held by the agents of the state for the state. The object is so to regulate the state that all its citizens may enjoy their lives, liberty, and property, and pursue their happiness according to the dictates of their own reason.”

⁹⁰ 21 Pa. 147, 59 Am. Dec. 759.

117. Subjects of taxation.—The power of municipal taxation extends over all persons and property within municipal boundaries, and in certain instances also to adjacent realty.

The law of actual situs prevails with regard to chattels. They are taxable by the municipality if they are usually kept or belong within its limits; and this is so regardless of the domicile of the owner. But goods and chattels found temporarily within a municipality are not taxable therein; as where a vessel is at a city wharf taking on freight, her situs is not there, but at the home port, or domicile of the owner.

118. State may impose taxes.—The state, in the exercise of its sovereign power, may impose special taxes upon the municipality for governmental, but not for strictly municipal, purposes. In creating a municipal corporation and conferring upon it the taxing power, the state does not and cannot surrender its own inherent sovereignty over the people and property within the municipal boundaries. No municipal power can exist in perpetuity.⁹¹ The inherent power of taxation possessed by a state may be exercised by the legislature upon property within as well as without the municipal boundaries; and for any strictly governmental purpose it is conceded that the state may tax municipal property not only for general objects, but by special assessment for local improvements.

It is also generally recognized by the courts that for purely municipal purposes the municipality may

⁹¹ *Meriwether v. Garrett*, 102 U. S. 472, LEADING ILLUSTRATIVE CASES.

not be taxed by the state without its consent. The two leading cases in the United States representing discordant views are those commonly known as the Philadelphia City Hall Case⁹² and the Detroit Park Case.⁹³ In the former of these it was ruled that the state might compel the city to pay for the erection of "an enormous pile which surpasses the town halls and cathedrals of the Middle Ages in extent if not in grandeur"; and in the latter that the state could not compel the city to pay for the purchase and improvement of a city park. Between these divergent views of legislative control over municipal corporations is found a variety of decisions in divers states as to the legislative power to impose taxes upon a municipality, which generally recognize the doctrine above stated, but differ in its application to particular cases.

119. **Express and implied power.**—The municipality may exercise the power of taxation expressly conferred upon it only within constitutional limitations. This doctrine is so self-evident as scarcely to need elucidation. The legislature itself can confer upon a municipality no greater measure of power than it possesses itself; and, since it can enact no valid law contrary to the constitutional provisions, it can confer upon the municipality no power to pass unconstitutional ordinances.

The municipality may levy taxes for the performance of any municipal duty imposed, or exercise of any municipal function conferred upon it by charter

⁹² *Perkins v. Slack*, 86 Pa. 270.

⁹³ *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

or by general law. Of the three classes of municipal powers, express, inherent and implied, it is obvious that a municipality for the purpose of taxation possesses the first within constitutional limitations, but may not exercise any under the second class. What implied power for taxation belongs to a municipal corporation is not so easy to determine. Here, however, as elsewhere, in the construction of municipal charters, the general doctrine is applied that the corporation has by implication such measure of power as is necessary to the proper execution of the charter powers expressly granted. Thus, the power to borrow money implies the power of taxation sufficient to repay the loan. The power to grade and pave streets implies the power to collect sufficient revenue to pay the expenses of the improvement. But power to make by-laws to "promote the benefit and advantage of a corporation" does not authorize it to levy a tax to pay the expense of procuring the location of a railroad through the municipality, and the power to enact by-laws necessary for the security, welfare, and convenience of the city does not authorize a tax on liquor dealers.

120. **License tax.**—A license tax may be imposed by the municipality only when power to do so is expressly conferred. Municipal licenses may be divided into two classes: (1) Police, and (2) revenue. A municipality may license certain occupations and forbid the exercise of the same by unlicensed persons. This is under the police power granted to the municipality; but in such case the fee to be charged against the licensee is determined by the necessary expense

connected with the police regulation. The taxing power, however, cannot be implied from the police power. And so where the sum charged for a municipal license is obviously for purposes of taxation, and not merely a license fee, the charge is unauthorized and void, unless authority to levy a license tax has been expressly conferred by charter or general legislation. The tax on occupations is upon persons pursuing such occupations within the city, whether their residence be inside or outside the corporate limits. And no discrimination can be made as between residents and non-residents. A person residing within a city cannot be taxed upon his occupation if it be pursued exclusively outside the municipality.

121. Assessment and collection.—Municipal taxes may be assessed and collected by state officers under general law, or by municipal officers thereunto authorized by the state, and appointed and directed by the municipality. The general methods of state taxation are pursued by municipalities. When municipal officers are appointed for this purpose they may discharge this duty as directed by statute or under municipal ordinances when authorized by law.

The municipality may use the tax duplicate or assessment list of the county or a special municipal assessment list may be made for the corporation according as the law may provide.

And as in case of assessments, so of collections, the duty may be performed under law either by county or municipal officers.

122. Creditors' rights.—The courts may compel the levy and collection of taxes by a municipality to

satisfy municipal indebtedness. A municipal creditor having matured indebtedness against a municipality may pursue the usual methods to enforce collection by action at law, judgment, and execution; but, since all municipal property used in the performance of governmental functions is exempt from execution, such mode of collection usually proves inadequate, and the creditor finds the usual remedy at law greatly embarrassed, and oftentimes totally ineffective. Whenever this is made to appear, the courts will grant him the remedy of mandamus to enforce satisfaction by means of taxation.⁹⁴

In the federal courts and some state courts a judgment is an essential prerequisite to this writ; but in many of the state courts this is not the rule; and in some the procedure admits of a judgment and mandamus in the same suit.

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⁹⁴ *Darling et al. v. Mayor and City Council of Baltimore*, 51 Md. 1, 88 Am. Dec. 248, LEADING ILLUSTRATIVE CASES.

LAW OF PUBLIC OFFICERS AND ELECTIONS

BY

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INTRODUCTORY.

1. **Increasing importance of the subject.**—In order that the state may act, it must do so through agents. These agents we call public officers. As the activities of the state increase, because of the massing of population, the number and the duties of the agents through whom the state performs its work must necessarily increase. In a rural community, the functions of government are comparatively limited: there is little which the state must do. The supply of water, food, light, means of transportation, fire protection, prevention of nuisances, may all be regulated with but very little intervention on the part of the government. But not so in a large city, where the conditions of life and organization of industry have so far increased the dependence of all upon the acts of others that rules regulating conduct increase in geometric ratio and the necessity for their enforce-

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ment becomes a matter of vital concern. An isolated farmer may keep hogs near his house, and the annoyance thereof is a matter which he may endure if he wishes, as it does not vitally concern his neighbors; but this is not so if he lives in a city. His business must then be regulated with a due regard to the health and comfort of others affected by his business. The same is true of one operating a glue factory or slaughter-house. These are but illustrations of a multiplicity of activities which in a city must be regulated under the police power. This increase in the amount of work to be done by public officers is one of the great facts in American life, which means that the number, powers, and duties of public officers are increasing and that therefore the law of public officers is becoming an increasingly important branch of our system of jurisprudence.

The term "administrative law" is used in two senses: a broad and a restricted sense. In the former, it includes all questions of public administration, such as civil service, municipal government, highways, elections, schools, and public revenue. In this sense, it presents problems not merely for the lawyer but for the political scientist as well. As the warrant for the exercise of administrative power must be found in the constitutions or in statutory legislation, questions of administrative law very often resolve themselves into questions of constitutional or statutory construction. On the continent of Europe, all positive statutory law is looked upon as coming within the scope of administrative law. But in the more restricted sense, administrative law deals with

the protection of private rights, the mode of exercising administrative power, and the remedies in case of the abuse of the power. In other words, it deals mainly with the law of public officers and extraordinary legal remedies. It is in this latter sense the term is generally used in the United States. While in England and the United States the courts still exercise a considerable degree of control over the acts of administrative officers, this control has in France been almost entirely removed, and to a considerable extent in the other countries of continental Europe. A comparison of these differences in point of view belongs to the field of comparative administrative law.

Those interested in this phase of the subject will do well to read *Comparative Administrative Law*, by Frank J. Goodnow, published in 1893. Though the European practice eliminates much of the dissatisfaction and irritation caused by the resistance of the judiciary to the prompt realization of the will of the majority, it does not furnish as good a guarantee for the protection of the rights of the minority, and hence is less conservative than is the American view.

CHAPTER I.

DISTINCTION BETWEEN OFFICE AND EMPLOYMENT.

2. **What is an office.**—In order that we may distinguish officers from employees, it is necessary that we distinguish an office from an employment. In extreme cases this is not at all difficult. We have no trouble in deciding that the man who works under contract at a dollar a day in digging a ditch to lay water pipes for a city owning its water plant is not exercising the duties of an office, but following an employment. But the matter is not always so free from doubt. The city engineer directing the work may be either an officer or an employee. If the city cares to put him in the latter class, it may do so by entering into a contract with him. This is the view taken by the Supreme Court of the United States in the case of *Hall v. Wisconsin*.¹ Here it was held that if the state had entered into a contract with a surveyor, in accordance with a statute directing the governor to make such a contract, the surveyor was an employee, not an officer. The court quotes with approval from the case of *Davis v. Gray*:² “When a state descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* (for this particular affair) as a private person itself, and is bound accordingly.”

¹ 103 U. S. 5.

² 16 Wall. 203 (U. S.).

In *United States v. Maurice*,³ Chief Justice Marshall says:

“An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. * * * Although an office is an ‘employment,’ it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or to perform a service, without becoming an officer. But if the duty be a continuing one which is defined by the rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.”

And in *United States v. Hartwell*,⁴ the court, speaking through Justice Swayne, says:

“An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. * * * A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.”

In *Clark v. Stanley*,⁵ we find this definition of a public office:

³ 2 Brock. 96 (U. S.).

⁴ 6 Wall. 385 (U. S.).

⁵ 66 N. C. 59.

“A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. * * * The oath, the salary, or fees are mere incidents and constitute no part of the office. Where no salary or fees are annexed to the office, it is a naked office—honorary—and is supposed to be accepted merely for the public good. This definition also excludes the idea that a public office must have continuance. It can make no difference whether there be but one act or a series of acts to be done; whether the office expires as soon as the one act is done, or is to be held for years, or during good behavior.”

In determining in a given case whether we have an office or an employment, the courts will consider how the functions have been regarded, as there are some duties so universally considered official that the one performing them is always regarded as an officer; how the one who performs the work was chosen, if by election, appointment, or by contract. With reference to the class of work commonly done by experts, it is optional with the state whether it shall be done by officers or by employees. What the state has intended in this respect and what it has done is of course a question for the courts.

3. **Why the distinction is important.**—The practical importance of this distinction arises from the fact that the term for which an employee is secured may not be arbitrarily shortened by the state without his consent, and if it is so shortened he has an action for damages. In other words, his agreement with the state is a contract within the meaning of the term in the Federal Constitution forbidding any state to

impair the obligation of contracts.⁶ His right is a certain, definite, fixed, private property right which he can enforce in the courts. For the legislative or executive branch of the government to deny or override this would be to confiscate his property, and it is to prevent this that the framers of the Constitution inserted in that instrument the above provision. But this is not true of the right of an officer to continue in office for any specific length of time. The legislature may, unless his office is one created by the Constitution, abolish his office and bring his term to an end at any time without giving him any right to damages for the loss of his position. It may be very disappointing to him and result in considerable loss, but it is what is known in the Roman Law as *damnum absque injuria* (loss without injury).

In contrasting private contracts of employment with the tenure of a public officer the Supreme Court of the United States says, in substance, in the case of *Butler v. Pennsylvania*,⁷ that private contracts for employment are clearly distinguishable from the engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public welfare shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is a matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither

⁶ Const. of U. S., Art. I, § 10.

⁷ 10 How. 402 (U. S.), LEADING ILLUSTRATIVE CASES.

the one nor the other can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being have been abrogated as detrimental to the well-being of the public. The promised compensation for services already earned during the term of service of the officer may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts not desired, would appear to be reconcilable with neither natural justice or common sense.

The establishment of such a principle would necessarily clog everything like progress or improvement in government; or if changes should be ventured upon the government would have to become one great pension establishment on which to quarter a host of sinecures. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and repeal laws; and to create and change or discontinue the agents designated for the execution of those laws. Such a power is indispensable to the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or the constitution of the state, as is the case in some instances in the state constitutions and in the Federal Constitution. The latter instrument has seen fit to protect the salaries of supreme court judges and the President against revision downward by the legislature. A sufficient explanation of this

exception to the rule is that it was thought best that one coördinate branch of the government should not be left to the mercy of the other. While then an employee may not have the power and prestige of an officer he has some advantage in the greater security of his tenure.

4. Right to office not a property right.—As it may be regarded as established law in the United States that the right to office is not contractual, so may it be regarded as settled that the right to office is not a property right, and hence does not come within the provision of the Fourteenth Amendment to the Constitution against depriving of property without due process of law. In the case of *Taylor v. Beckham*,⁸ the Supreme Court of the United States affirmed a decision of the Court of Appeals of Kentucky, that the right of the governor or lieutenant governor to hold office was not a property right and hence did not come within the provision of the Fourteenth Amendment, but, being created by the state constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by the amendment. The court, speaking through Chief Justice Fuller, there says: "The view that public office is not property has been generally entertained in this country." The decisions are numerous that public offices are mere agencies, or trusts, and not property

⁸ 178 U. S. 548.

as such. Nor does the fact that the Constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. In short, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. But when one has been duly elected to office, has qualified and entered upon the duties of his position, though the legislature or other controlling power may abolish the office, the officer may not be ousted, except upon proper legal proceedings wherein good cause is shown.

CHAPTER II.

CREATION AND FILLING OF OFFICES.

5. **How an office is created.**—Having examined the nature of an office and attempted to distinguish it from an employment and from a property right, the next matter for consideration is the way in which offices are created. The very important ones have been created by the Constitution. But these are a relatively small portion of the whole number. By far the greater number of offices are created by the legislature. In doing this no particular form is necessary, nor is this a power which the legislature may not delegate to a municipality.⁹ For it would, indeed, be unwise for a legislature to attempt to say just what officers are needed by a large city. Considerations of expediency make it advisable that considerable latitude be left to the judgment of the municipality in determining what agents it shall use in performing its governmental functions. The reason for the existence of a city government rests upon the fact that in a densely populated area a special set of problems arise which demand special treatment, and that whether a given function is of sufficient importance to demand the creation of a special agency for performing it can best be judged by those who can study the situation at close range. It would be a

⁹ *State v. Hyde*, 129 Ind. 296; *Miller v. Warner*, 42 N. Y. App. Div. 208.

hardship upon a municipality for the legislature to create offices which the local situation did not demand, but the expense of which would have to be borne by the locality. Sinecures are bad enough when created by those who have to bear the expense, but intolerable when created by those who do not have to bear the burdens.

6. **Who is a public officer.**—Since there is a lack of definiteness as to what is a public office there is, of course, the same indefiniteness as to who is a public officer. The following are the principal definitions of the words “office” and “officer,” which have been given in England: “It is said that the word ‘officium’ principally implies a duty, and in the next place the charge of such duty, and that it is the rule that where one man hath to do with another’s affairs, against his will and without his leave, that this is an office, and he who is in it is an officer. Officers * * * are public or private; * * * and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits, because it is the duty of his office, and the nature of that duty which makes him a public officer, and not the extent of his authority.”¹⁰

“In my opinion,” said Lord Chief Justice Best, “every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, from the crown or otherwise, is a public officer.” Blackstone includes offices among incorporeal hereditaments, and defines an office to be “a right to ex-

¹⁰ Throop, Public Officers, § 2.

ercise a public or private employment, and to take the fees and emoluments thereunto belonging." In a case involving the question of whether or not an "attendant" upon a court of record in the city of New York is a public officer, the Supreme Court of that state, speaking through Justice Danforth, in the case of *Rowland v. Mayor of the City of New York*,¹¹ says: "He not only owes a duty to it (the court), and is to perform such duties as are by it required to be performed, but as we have already said, those duties are in aid of the proper business of the court * * * and his employment is one in which the public are interested; its proper exercise requires capacity, diligence, and attendance. Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office. However, therefore, the signification of the word used is ascertained, it will comprehend the position of the plaintiff as stated in the record, for although his functions may be those of service, his employment is by the public, and the duties intrusted to him are official and a public charge."

The extent of the territory within which the duties are to be exercised is, of course, immaterial; provided the duties are such that the state is charged with the task of performing them, the agent through which it acts is a public officer.¹² It is also clear that as the state may require service gratis, the presence or ab-

¹¹ 83 N. Y. 372.

¹² *People v. Bedell*, 2 Hill 196 (N. Y.).

sence of emoluments is no test. It is equally clear that, as the state may dictate the conditions under which the services may be rendered, the requirement of or the failure to require an official oath is not at all conclusive.¹³ In *Commonwealth v. Evans*,¹⁴ the Supreme Court of Pennsylvania, speaking through Justice Sharswood, says: "All persons, who by authority of law, are intrusted with the receipt of public moneys, through whose hands money, due to the public or belonging to it, passes on its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be general or special, transient or permanent." But the fact that one handled no money for the public would, of course, not prove that he was not a public officer. Upon the question of whether or not attorneys, solicitors, counsellors, and barristers, are public officers, we have, in this country, a conflict of authority. In *Ex parte Garland*,¹⁵ the Supreme Court of the United States holds that they are not. The Supreme Court of New York has decided in 2 Cowen 29 that they are and in 20 Johnson 492 that they are not. In England they are generally regarded as public officers. In *Walmesley v. Booth*, Lord Hardwicke says: "They are to be considered as public officers and ministers of justice."¹⁶ The weight of authority in the United States is that they are not public officers.

¹³ *People v. Langdon*, 40 Mich. 673.

¹⁴ 74 Pa. St. 124.

¹⁵ 4 Wall. 333 (U. S.).

¹⁶ Barn. Ch. 475 (Eng.).

7. **Classification of public officers.**—Officers are classified by Bacon into (1) civil and military; (2) public and private; (3) ancient and those of new creation; (4) judicial and ministerial. The third division is not recognized in the United States. Judge Cooley divides public officers into legislative, executive, judicial, administrative, and ministerial, but admits that an accurate classification is difficult, if not impossible. He says:¹⁷ “The duties imposed upon the officer are supposed to be capable of classification under one of these heads: the legislative, executive, or judicial; and to pertain accordingly to one of the three departments of the government designated by those names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for themselves what is to be done. But sometimes, also their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.”

Justice Clifford, speaking for the court in *Fitz Patrick v. United States*,¹⁸ makes the following classification: “Offices may be and usually are divided into two classes—civil and military. Civil offices are also usually divided into three classes—political, ju-

¹⁷ 2 Southern Law Review U. S. 531.

¹⁸ 37 Ct. of Cl. 332.

dicial, and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president, or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose, and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior."

The revised statutes of New York make the same classification as Judge Cooley in the article quoted above.

8. **Method of filling offices.**—In the absence of constitutional restrictions, the legislature may provide any method it wishes for filling offices. Whether the officer shall be chosen by an election or by appointment is a matter of expediency of which the legislature is, in the absence of constitutional provisions, the judge. Though there is a strong tendency in this country toward selecting public officers by popular election and the constitutions have in many cases required it, where such provisions do not exist the legislature may provide for election or appointment by any of the coördinate branches of the government or even by private associations such as legal or medical societies, and *In re Bulger*¹⁹ the Supreme Court of California sustained a statute conferring upon the board of fire underwriters authority to appoint the city fire commissioners. It is usual to leave to the coördinate branches of the government

¹⁹ 45 Cal. 553.

the power to appoint their subordinate officers, and, in the absence of constitutional provisions, this right may be conferred by statute even though it violates the theory of separation of powers. In the case of *In re Janitor of Supreme Court*²⁰ it was held that the courts might appoint their own subordinates and that it was doubtful if the legislature could deprive them of this right.

In this case a janitor of the court had been removed by the superintendent of public property. The court says: "It is a power inherent in every court of record and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar and a power so essential to the conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it. As a power judicial, and not executive or legislative, in its nature, and one lodged in a coördinate branch of the government separate and independent in its sphere of action from the other branches, it seems to be under the protection of the Constitution, and therefore a power which cannot be taken from the court, and given to either the legislative or executive departments, or to any officer of either of those departments."

9. Nominations.—It is not unusual for the suggestion of names and the final choice of public officers to be made by different individuals or even by different branches of the government. The power of the Senate to reject nominations made by the

²⁰ 35 Wis. 410.

President is an instance. In the case of popular elections the nomination is usually made by the party organizations, but here also there is a strong tendency toward popularization. The direct primary which gives the individual voter a direct voice in making nominations, as well as in elections, is supplanting the convention system in many states, and while its working is not entirely satisfactory it will, in those states where it is once adopted, be very difficult to get back to the convention system. Men are as a rule very loath to give up political power and rarely do so except under compulsion. But in this case it is difficult to see how the voter once in possession of the right to vote in primaries could be coerced into surrendering his right. Where the right is provided for in the Constitution it would be practically impossible to take it away and where it is provided for by statute it would be almost equally difficult to repeal it in states where the referendum prevails. Given human nature as it is, an extension of the system of primary elections is far more probable than the abolition of it.

10. **Effect of nominations.**—The usual effect of a nomination by a party acting through the medium of a convention or primary is to give the nominee the right to have his name appear on the ballot at the election under the caption of his party as its regular candidate for the office. But if there are irregularities in the convention or primary, either because of a split in the convention or doubtful eligibility of those taking part in the primary or other causes, the remedy of the one claiming the regular nomination

is not clear. Whether the decision of the party organization acting through its committees is final, or whether the courts may, by mandamus, order his name placed upon the ballot as the regular candidate of his party and entitled to the exclusive use of the party caption, is a matter upon which the courts are not entirely agreed. Neither is it agreed whether or not the legislature may confer such power upon the courts. The New York courts have exercised the power under a statute of this sort and in that state the constitutionality of the statute does not seem to have been raised.²¹ But in the case of *Stephenson v. Board of Election Commissioners*,²² a leading case, the court refused to grant a mandamus to one claiming the nomination under the certification of the regular officers of a convention, which had split and made two nominations, and ordered that the names of both nominees appear on the ballot. The court thus refuses to take the responsibility of deciding upon the regularity of election of delegates and proceedings of the convention, but places it upon the voters.

In justifying this position it argues that "the voters must protect themselves against fraud upon their convention or misconduct of its delegates, officers, and candidates, and when a considerable faction of the convention leaves the meeting, and nominates a ticket, claiming to be the representative of the party, it is not the province of the courts to determine upon technical grounds that it is not,

²¹ *In re Fairchild*, 151 N. Y. 359.

²² 118 Mich. 396.

and that its action is void, and deny it a place on the ballot, thereby defeating the purification of methods within the party, or to say which faction was right and which wrong. It is a right of the voter to repudiate wrong and corruption and fraud, if it exists, and to prevent or unearth and defeat corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents the only pure Republicanism of the district and is the lawful nominee of the true party.

“The electors must decide between them. In such case we know of no way of determining which of these names ought of right to go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the rights of the question. The same may be true of the boards. They may not know what they should do and we cannot tell them further than to say that, under the admitted facts and precedents, both are entitled to places upon the ballot.”

11. **Who may vote for public officers.**—If, then, contested nominations must be settled by the voters it becomes necessary to determine who may vote at elections for choosing public officers, because the qualifications of voters at such elections are not necessarily the same as at other elections. In the United States the people acting through their constitutional conventions have the right to say who shall possess

that mark of membership in the political state, which we call the right to vote. This they may do in general terms or in detail. Most commonly they pursue the former method and leave to the legislature the task of making statutory provisions for the details necessary to deciding who shall vote and how the right shall be exercised. The Constitution of the United States originally left the matter of deciding who had a right to vote to the states. It took the Civil War to change this, and the Fifteenth Amendment forbids discrimination by the state on account of "race, color, or previous condition of servitude." Though this has remained to a considerable extent a dead letter, it is an assertion of the right of the Federal Government to override the power of the states when occasion demands. The Federal Government may yet find it necessary to forbid any who are not citizens of the United States from voting in elections of federal officers. At present a great many who are not citizens of the United States but have merely declared their intention to become such are permitted by the states to vote in state and federal elections. The time, place, and manner of holding elections is left to the states except that the day for choosing presidential electors shall be the same throughout the United States, and the place of choosing United States senators may not be changed, by the states.

12. **Registration.**—When not forbidden by the Constitution, the legislature has power to pass registration laws excluding from participation in the election those who fail to comply with such laws. This is considered a legitimate means of regulating

the exercise of the elective franchise and preventing corruption in elections. But it must be bona fide for the purpose of regulation, and not disfranchisement under the guise of regulation. As said by Chief Justice Thompson in *Page v. Allen*: "The right must not be impaired by the regulation. It must be regulation purely, not destruction. The regulation must be subordinate to the right to be regulated." Registration laws do not add to the constitutional qualifications; as such provisions respecting the qualifications of voters must contemplate the application of reasonable methods for the purpose of preventing fraud and imposition upon election officials. They provide a means of examining into the voter's claim to a right to vote. And if the Constitution "has made no provision in regard to the time, place, and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right in relation to which it is competent for the legislature to make suitable and reasonable regulations not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."²⁸ These general principles have been recognized by the courts of Connecticut, Rhode Island, Ohio, Iowa, Illinois, Michigan, Nebraska, Tennessee, and Mississippi. But in *White v. County Commis-*

²⁸ 58 Pa. St. 338; *Capen v. Foster*, 12 Pick. 485 (Mass.), opinion of Chief Justice Shaw; *Kinneen v. Wells*, 144 Mass. 497, LEADING ILLUSTRATIVE CASES.

sioners,²⁴ the Supreme Court of Oregon held that where the Constitution prescribes the qualifications of voters, a statute imposing the additional requirement of registration is unconstitutional.

13. **Question of reasonableness.**—If, then, a provision of a registration law is reasonable, the weight of authority in this country is that it is not unconstitutional unless expressly forbidden by the Constitution. But for the purpose of determining whether or not a particular provision in a registration act is reasonable only the most general rules can be laid down. Where a person is required to take an oath embracing a qualification different from that prescribed in the Constitution, and is refused registration unless such oath is taken, such requirement is unconstitutional and void.²⁵ The same is true of a provision requiring an oath that he has not been guilty of certain acts, the effect of which would be to forfeit his right of suffrage.²⁶ But it is not unlawful to require him to take an oath as to residence, citizenship, or the like,²⁷ provided he is not required to supplement his own oath by the oath of others as to his qualifications. A provision requiring one who had been absent from the state for a specified length of time to present a certificate showing that he had been continuously on the tax list is unconstitutional in states having no property qualifications for voting. Likewise a provision requiring one who had been absent from the state for six months to be reg-

²⁴ 13 Oregon 317.

²⁵ *Page v. Allen*, 58 Pa. St. 338.

²⁶ *Burkett v. McCarty*, 10 Bush 758 (Ky.).

²⁷ *People v. Hoffman*, 116 Ill. 587.

istered at least ninety days before the election would be unconstitutional where the length of residence in the precinct is fixed by the Constitution at thirty days.²⁸ And in *State v. Corner*²⁹ it was held that a registration law requiring one to be registered ten days before election was unreasonable, where no provision at all was made for registration on election day.

A like view has been taken by the courts of Ohio and Wisconsin. But the courts of Illinois, Rhode Island, and Georgia, have taken an opposite view. In *Attorney General ex rel. Coneley v. Common Council*³⁰ the Supreme Court of Michigan declared unconstitutional such a statute passed in July, 1889, on the ground that it would disfranchise persons necessarily absent from the city on the date fixed by the act for registration and those moving from one ward to another between that date and election. The court says:

“These authorities all tend in one direction. They hold that the legislature has a right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to

²⁸ *Morris v. Powell*, 125 Ind. 281.

²⁹ 22 Nebr. 265.

³⁰ 78 Mich. 545.

return home to register as well as to vote, making two trips when only one ought to be required. In my opinion, no registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as well require of the elector entirely new qualifications, independent of the Constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our state, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the Constitution, then the remedy is with the people to alter such Constitution by the lawful methods pointed out and permitted by that instrument."

14. Minority representation and cumulative voting.—In order to give the minority representation in legislatures and on administrative boards a number of devices have been resorted to, but the difficulty can hardly be considered as having been satisfactorily solved. Unless provision is made in the state constitution, it is not certain that the legislature has the power. The Supreme Court of Ohio in *State v. Constantine*⁸¹ held unconstitutional a statute pro-

⁸¹ 42 Ohio St. 437.

viding that an elector might vote for a portion only of several officers to be elected. The reasons for adjudging this statute void were thus stated by the court: "No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adoption of this constitution in 1851. The right of each office to be filled at an election had never been doubted. No effort was made by the framers of the constitution to modify this right; and we think it was intended to continue and guaranty such right, by the provision that 'each elector shall be entitled to vote at all elections.' Such right is denied by this statute, which provides for the election of four members of the board of police commissioners, but denies to any elector the right to vote for more than two persons for such commissioners."

Also in *Maynard v. Board of Canvassers*³² the Supreme Court of Michigan held unconstitutional a statute providing that "in all elections of representatives to the state legislature in districts where more than one is to be elected, each qualified elector may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same among the candidates as he may see fit, and the candidates highest in votes shall be declared elected"; i. e., a statute providing for cumulative voting, a practice very common in elections of directors of private corporations. After reviewing the restrictive, cumulative, Geneva, and Hare, plans for minority representation the court, speaking through Chief

³² 84 Mich. 228.

Justice Champlin, makes the following clear and concise statement:

“There is in my mind no doubt that the act under consideration is unconstitutional. The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their Constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than it does in a democratic. When there are more than two candidates for the same office placed in nomination, it may often happen that one candidate, although he may receive more votes than any other, may not receive a majority of the votes cast. Still the principle of majority rule is preserved, for in such case more of the electors prefer such candidate than they do any other particular candidate to represent them. It is the constitutional right of every elector, in voting for any person to represent him in the legislature, to express his will by his ballot; and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for.”³³

³³ Maynard v. Board of Canvassers, *supra*.

15. **Majority and plurality.**—In the absence of constitutional or statutory provisions that a candidate shall receive an actual majority of votes cast at the election for candidates for the office for which he is running, when there are more than two candidates, the one receiving the highest number of legal votes is elected. In other words the term “majority” is not infrequently used in the same sense as “plurality.” Though an absolute majority, i. e., more than half of those eligible to vote, may be required to pass amendments to the Constitution, the term “majority” will not be so interpreted with respect to officers unless expressly required in the Constitution or statutes. As said by Chief Justice Waite in *Cass County v. Johnston*:⁸⁴ “All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed.” When two or more officers of the same designation are to be chosen at a given election, a like number of persons voted for standing highest on the lists will be declared elected.⁸⁵

16. **The ballot.**—The kind of ballot that shall be used is a matter for the legislature to determine.⁸⁶ The propaganda now going on in favor of the short

⁸⁴ 95 U. S. 360.

⁸⁵ Cooley Const. Lim. (5th ed.), 779.

⁸⁶ *Ransom v. Black*, 54 N. J. L. 446.

ballot is one which should be directed to the legislatures, unless thought of sufficient importance to be placed in the constitutions. As state constitutions are already, as a rule, too long and cumbersome because too much matter is crowded into them which belongs in the statutes, it would hardly seem expedient further to encumber constitutions with amendments reducing the number of elective offices. Where the statute requires that the ballot be of a particular color, it has been held that this requirement is substantially complied with when all ballots used at the same voting place are of the same color. In the case of *Boyd v. Mills*,³⁷ the election was contested on the ground that in a given precinct yellow ballots were used, whereas the statute required white ones, and the throwing out of this precinct would affect the result of the election. The court, speaking through Justice Allen, says:

“Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at that voting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the

³⁷ 53 Kan. 594.

use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual voters, a different question would be presented. We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purposes of the act can have been impaired in any degree by the mistake made in using the colored ballots. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions."

17. **Assistance to voters.**—Where an educational qualification is not a prerequisite to voting, the statutes may and should provide for the rendering of assistance to illiterate voters. In order to avoid corruption, assistance by others than election officials should be forbidden, but it is a travesty to expect a man who cannot read to mark his ballot without assistance. It therefore follows that if such are to be allowed to vote, the proceeding should be relieved of the character of a gambling operation by furnishing them official assistance. The high percentage of voters in our large cities who cannot read English makes this a question of practical, rather than one of merely academic, importance. The throwing out of ballots not properly marked is not a sufficient safeguard. The ballot may, by accident, be marked so that it is a legal ballot and yet not express the will of the voter, and unless it does, the election becomes, to that extent, a farce. An election purports to be

a means of giving expression to the popular will and should be so conducted that it will come as near to doing this as possible.

18. **Canvassing of votes.**—When the votes are all cast there remains the task of counting them, nor is this a mere mechanical task, for the ballots are not like so many apples, each necessarily amounting to one in the count. But as the validity of each ballot must be passed upon in order to determine whether or not it should be counted, the work of a board of canvassers becomes a quasi-judicial function. Their finding is *prima facie* evidence of the title to office of the one whom they declare to be elected. But it is only *prima facie* evidence and to hold it conclusive would be putting a dangerous power into the hands of a board which is not infrequently so made up that it can be swayed by partisan considerations. The will of the voters ought not to be subjected to the danger of being defeated by the findings of such a board. Their findings are less likely to be partisan if their decision is subject to review. In the last analysis the court may go behind the decision of the board of canvassers to the ballots themselves and may even go behind the ballots to the voter if necessary to do so in order to find out what the ballot really means.³⁸ In the case of the *People v. Vail*³⁹ the court said: "The decision of the canvassers was conclusive in every form in which the question arises, except that of a direct proceeding by *quo warranto*, to try the right. But, to hold it conclusive in this proceeding

³⁸ *People ex rel. Yates v. Ferguson*, 8 Cow. 102 (N. Y.).

³⁹ 20 Wend. 12 (N. Y.).

would be nothing less than saying that the will of the electors plainly expressed in the forms prescribed by law may be utterly defeated by the negligence, mistake, or fraud of those who are appointed to register the results of an election."

19. **How to compel canvassing board to act.**—The work of a canvassing board, though in a sense judicial, is not altogether so. Though the decision of a dispute one way rather than another is a discretionary act, whether or not it will decide at all is not discretionary. Their duty to act is a ministerial duty and may be compelled by mandamus. Not only is this true in the first instance, but if a recount is deemed necessary by the court, under these circumstances the canvassing board may be compelled by mandamus to act. As said by Justice Brewer in *Lewis v. Commissioners*:⁴⁰ "It is settled by abundant authority that where the board refuses to canvass any of the votes it may be compelled so to do by mandamus, and this though the board has adjourned *sine die*. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of the term of a district court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that

⁴⁰ 16 Kan. 102.

court, which has been tendered to him before the adjournment."

20. **What constitutes an election.**—In order that an election may be binding, i. e., may have legal effect, it must be called in accordance with law by the proper authority to call such an election and it must be conducted in accordance with law by the proper officers. As these matters are regulated by statute this is another way of saying that elections, in order to be regular and legal, must conform to statutory requirements. Of course, if the people see fit to take this power from the legislature they may do so by inserting provisions in the state constitution similar to provisions in the Federal Constitution which govern in the election of President and Vice-President of the United States.

Whether or not there has been a sufficiently substantial compliance with the law to constitute a bona fide election, as well as what is the actual result of an election, must ultimately be settled by the court. Most commonly a plurality rather than a majority of the votes cast is sufficient to decide an election, unless there is a provision to the contrary. Where there are several running for the same office this would mean that a candidate may be elected who has received but a minority of all the votes cast at that election, for the office for which he was a candidate. It may even happen that where there are but two candidates for the same office one may be elected who has received neither a majority or a plurality of the ballots which were cast for candidates for that office. This is admitted by the court in the case of

People ex rel. Furman v. Clute.⁴¹ In this case Furman received but a minority of the votes cast, but Clute, who received a majority, was ineligible to the office by reason of his holding another office. But there was not sufficient proof that the voters knew that he held the other office, so that they could not be said to be intentionally throwing their votes away by casting them for one whom they knew to be ineligible. Under these circumstances the court considered that there had been no election. The rule governing such cases is thus stated by the court: "The existence of the fact which disqualifies, and of the law which makes the fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home as to imply a willfulness in acting, when the action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both law and fact, and so in opposition to his own better knowledge that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied."

21. **Advantages and disadvantages of elections.**— Though a popular election is a slow, cumbersome and expensive method of choosing public officers, it has certain decided advantages. It is educative and gives the common people a share in government which they could not exercise effectively in any other way. As a rule the sense of responsibility which a public of-

⁴¹ 50 N. Y. 451, LEADING ILLUSTRATIVE CASES.

ficer feels toward the people is greater where he owes his official position to them, and this sense is keener where he owes it directly rather than indirectly. It is a recognition of this fact that has brought about a change in the method of electing United States senators. Here the urgency and determination were so great that it was practically effected in many states without waiting for a change in legal forms.

The degree of advantage resulting from popular election depends measurably upon the character of office to be filled as well as upon the degree of knowledge which the average voter has of what may be reasonably expected of the officer. It must be admitted that with reference to certain classes of officers this method of selection has its limitations. While most agree that legislators should be chosen by election rather than by appointment, with regard to judges there is room for honest difference of opinion, and as regards experts such as engineers or chemists, about whose duties or qualifications the average voter cannot be expected to have much knowledge, it is pretty generally agreed that appointment is the preferable method of selection. It may be that in this country the method of choosing officers by popular election has been extended somewhat beyond its natural limits, but with reference to this as with reference to all matters of government, the final test is its practical working. If it works well, its conformity or lack of conformity to theory is not a vital matter. Results are the touchstone for testing governmental machinery. If experiment shows that

for a given people a certain system works well, it has justified itself for that people, however miserably it may have failed when tried by other people.

22. Appointment to office.—Since the method of selecting public officers by appointment is now and will continue to be a matter of more than academic importance, it is necessary that the law governing it be considered. This law is to be found partly in our constitutions and partly in our statutes. The Constitution of the United States confers upon the President a very large power of appointment. In Art. II, § 2, we find this provision: "He shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." The state constitutions usually grant to the governor a much more limited power of appointment; indeed, unless it is specifically conferred he has no power of appointment, as he may not exercise it as a residuary power, for as decided by the Supreme Court of Illinois, in *Field v. The People*,⁴² the legislature is the sole possessor of residuary powers—the governor having merely such powers as are delegated to him.

23. Nature of the power to appoint.—While the power to appoint to office is primarily an executive

⁴² 3 ILL. 79.

function, it is exercised to a limited extent by the legislative and the judicial branches of the government. The Constitution of the United States provides in Art. I, § 2, Clause 5: "The House of Representatives shall choose their speaker and other officers." These other officers may, of course, be chosen by appointment as well as by election. When by appointment the speaker exercises the appointing power. Section 3, Clause 5, says: "The Senate shall choose their other officers, and also a President *pro tempore* (for the time) in the absence of the Vice-President, or when he shall exercise the office of President of the United States." Though the Constitution does not contain a similar provision with regard to the courts, they are given the power by statute. Both the supreme and inferior courts appoint their clerks and bailiffs, but not their marshals. The rule as to appointment of clerks and bailiffs by the judges is pretty generally, if not universally, followed in the state courts. This limited exercise of an executive function by the legislature and courts is not a sufficient infraction of the principle of separation of powers to cause any considerable demoralization in the system of government, and furthermore it is a matter of practical convenience to judges to be able to select for themselves the men with whom they will have to work, and between whom and them the relations are more or less of a personal and confidential nature.

24. **Exercise of power compulsory.**—Though the choosing between two or more persons eligible to appointment is a discretionary function, where the

power to appoint exists, the exercise of it is ministerial and may be compelled by mandamus. For, while it is necessary, in order that the power of appointment may be something more than a mere name, that the one exercising it shall have some power of choice between candidates, it is also necessary that the public service shall not be allowed to suffer merely because one having the power of appointment is, for any reason, disinclined to perform his duty.

The necessity of allowing some discretion to the appointing power is well stated by the Court of Appeals of New York, in the case of *People ex rel. Balcom v. Mosher et al.*⁴⁸ This is a case in which the constitutionality of the civil service law requiring the appointment of the applicant standing highest on the list, was questioned. The court says:

“If the civil service commissioners have power to certify to the appointing officers only one applicant of several who are eligible and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final, or if where more are certified the one graded highest must be appointed, then the civil service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word ‘appointment’ as used in the Constitution is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty, with no discretion, nor choice, nor responsibility in respect to the person to be appointed. Such a construction would

⁴⁸ 163 N. Y. 32.

completely nullify the provision of the Constitution which confers the power of appointing city officers upon the local authorities of the municipality. A fair reading of the Constitution leads to no such result."

The court then quotes with approval from the United States Attorney-General as follows:

"If to appoint is merely to do a formal act, that is, merely to authenticate a selection not made by the appointing power, then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which Congress may prescribe or authorize. But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the President in appointing a marshal, if the Senate in appointing its secretary, if a court or head of a department in appointing a clerk, must take the individual whom the civil service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President, of the Senate, of the court, or of the head of the department, but are the will and judgment of the civil service board, and that board is virtually the appointing power."

25. Form of appointment.—The courts hold that an oral appointment is not sufficient. The reason for this rests in no mere technical rule of law. It would lead to no end of confusion if several per-

sons might contest the right to exercise the duties of an office, each claiming title upon the basis of a verbal appointment by the appointing power. Verbal statements are too easily misunderstood, misinterpreted, or forgotten, to form any adequate basis for laying claim to an office the functions of which are of vital importance to the public. In other words, the state has too great an interest in the prompt performance of official duties to risk the confusion and delay which might result from a multiplication of contests for office, and especially if such uncertainty and confusion may be avoided by the exercise of reasonable precautions upon the part of the appointing power. Nor can it be said that the requiring of written evidence of the appointment is an unreasonable requirement either as regards the appointing power or the claimant. This is true whether the act of the appointing officer is final or needs ratification, although in the latter case the absence of written evidence would not be productive of so much mischief, as it could be much more easily corrected. If there is sufficient reason for enacting the Statute of Frauds requiring written evidence of transactions between private individuals which do not affect the public except remotely, there is much stronger reason for requiring written evidence of acts which affect the public directly.

In discussing this question the Court of Appeals of New York says in *People ex rel. Babcock v. Murray*:⁴⁴ "There is no color in the opinion, or in the statutes of this state, or any custom or usage of which

⁴⁴ 70 N. Y. 521.

we have knowledge, for claiming that an appointment to any civil office can be made verbally or without a proper writing evidencing the fact." The only exception we know to this rule is that of an oral appointment in open court. Here the reason for the rule does not hold and consequently the rule can be safely modified.

26. **The commission.**—So long as there is evidence in writing of the appointment, the courts do not insist that this writing shall be in any particular form, unless a particular form has been made necessary by statute. This writing is commonly called a commission and usually given under seal. The latter is not, however, unless made so by statute, a prerequisite to the validity of the commission. In general, any form of writing which shows clearly an intent on the part of the proper authority to appoint a certain individual to a given office for which he is eligible, constitutes a sufficient commission. The signature of the appointing power is, of course, necessary. As said by the court in the case of *Babcock v. Murray*, above: "The signing of the commission is an integral part of the duty of the delegated power and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office."

27. **When appointment is complete.**—Appointment is inchoate until the last act to be performed by the appointing power is completed. This act is the signing of the writing or commission. The appointing power has then committed itself by an unequivocal act, the effect of which is a matter for interpre-

tation and enforcement by the courts. The leading case upon this question is that of *Marbury v. Madison*.⁴⁵ This case was an action for a mandamus to compel the Secretary of State to deliver a commission signed by President Adams appointing Marbury a justice of the peace. The Supreme Court of the United States, speaking through Chief Justice Marshall, says: "Some point of time must be taken when the power of the executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission. The time for deliberation has then passed. He has decided. His judgment has been made and the officer is appointed."

28. **Title to office determined by quo warranto.**—Where a question arises as to the title of an officer to his office his right is determined by a quo warranto proceeding unless the statutes have provided some other method. The granting of this writ rests in the sound discretion of the court, if the application is by a private person;⁴⁶ but if the application is by the attorney general the court has no discretion, unless otherwise provided by statute.⁴⁷ Where the application is made by a private person he must show that he has some interest in the question to be decided; but it has been held that the interest which a tax-

⁴⁵ 1 Cranch 137 (U. S.), LEADING ILLUSTRATIVE CASES.

⁴⁶ *Commonwealth v. Jones*, 12 Pa. St. 365.

⁴⁷ *Commonwealth v. Allen*, 128 Mass. 308.

payer has in the due administration of public affairs is sufficient, if he is merely asking to have the one ousted who is unlawfully holding the office.⁴⁸ But if the relator is seeking to put himself into the office from which he is asking that another be ousted, he must, in order to entitle him to the writ, show that he has, *prima facie*, a better title.⁴⁹ It must also appear that the controversy relates to the title to a public office and not to a mere employment.⁵⁰ Again it must appear further that the alleged usurper has or has had actual possession and user of the office, a mere claim by him is not a sufficient basis. But, if he has been in possession, his abandonment of it will not defeat the issuance of the writ.⁵¹

⁴⁸ *Commonwealth v. Meeser*, 44 Pa. St. 341.

⁴⁹ *People v. Rynders*, 12 Wend. 425 (N. Y.).

⁵⁰ *People v. Hills*, 1 Lans. 202 (N. Y.).

⁵¹ *State v. Graham*, 13 Kan. 136.

CHAPTER III.

POWER TO FILL VACANCIES.

29. **Elective offices.**—As the process of selecting a public officer is by popular election or by bodies not always in a position to act promptly, and as it is desirable to avoid an interregnum so that the public business may not suffer by reason of there being no one duly authorized to perform the duties of a given office, provision is made for filling vacancies in elective offices by appointment. This appointment is only temporary and lasts only until the emergency is over, i. e., until it is practicable to hold an election. Where the body having the power to elect has had an opportunity to fill the vacancy but has failed to do so, there is a difference of opinion as to the effect of such action. The United States Senate has adopted the policy of interpreting this to mean that a failure to elect where there has been an opportunity is equivalent to an expression of the will of such body that the office continue vacant. Hence, where a state legislature has had an opportunity to elect someone to fill a vacancy in the United States Senate, but has failed to do so either because of a deadlock or for whatever reason, the Senate will not seat one appointed by the governor to fill such vacancy. The cases of W. A. Clark, of Montana, and M. S. Quay, of Pennsylvania, are, perhaps, the best known cases followed as prece-

dents by the Senate. The same view is not, however, followed by all the states, in the case of state officers. The governor is allowed to fill a vacancy even though the legislature has, by its action, expressed itself in favor of having the vacancy continue.

30. **When a vacancy happens.**—The Constitution of the United States provides: "The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The constitution of New Jersey contains a similar provision. Mr. Sanderson, judge of Hunterdon Pleas, died while the senate was in session. The governor nominated Mr. Kuhl as his successor and the senate refused to ratify the nomination, thus leaving the office vacant. During the recess of the legislature, the governor appointed Mr. Kuhl to fill the vacancy. An action was brought to determine the legality of this appointment by the governor. The decision turned upon the interpretation of the word "happen." It was admitted that if "happen" meant to "take place, arise, or originate," the vacancy could not be filled by the governor because it did not arise during the recess of the legislature. If, upon the other hand, it meant to "exist," the governor would have the power to fill it. The court decided that while the first seemed most accordant with the letter of the Constitution, the latter was most accordant with its reason and spirit. It therefore decided in favor of the governor's appointee.⁵²

⁵² *Fritts v. Kuhl*, 51 N. J. L. 191.

31. **Anticipatory vacancies.**—In order that the appointing power may fill a vacancy it must be one which begins before the term of office of the one making the appointment expires. It is of no consequence that if no appointment is made a vacancy will be sure to exist. In other words, the appointing power may not anticipate a vacancy which will arise in the future but not until after the term of office of the one making the appointment has expired. This rule is well illustrated by the case of *People ex rel. Sweet v. Ward*.⁵³ The facts were briefly these: Ward was the duly elected district attorney of San Diego County for the term commencing January 2, 1893, to serve until January 7, 1895, or until his successor was duly qualified. He qualified and entered upon the discharge of the duties of the office. In the November preceding the expiration of Ward's term, William Darby was elected to succeed him. Darby duly qualified on November 24, and died December 15 of the same year. Ward's term of office would expire on January 7, 1895. On the 2nd day of January of that year the board of supervisors, of whom the terms of two would expire on January 7, 1895, met and appointed Ward to be district attorney "for the term of office to be taken at 12 M. on the seventh day of January, 1895." On the day of his appointment, Ward qualified in due form as the appointee to succeed Darby. At 3 P. M. on January 7, 1895, the new board declared a vacancy to exist in the office of district attorney and appointed Sweet to fill the same for the term for which Darby had been elected, and

⁵³ 107 Cal. 236.

Sweet in due course qualified, made demand upon Ward for the office and upon his refusal brought quo warranto proceedings. The court decided in his favor on the ground that "the board could, by its action, neither create a vacancy, nor by anticipation, fill one, which was to arise *in futuro* during the term of its successor." In support of this conclusion they quote from Mechem on Public Offices, § 133: "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired."

CHAPTER IV.

ACCEPTANCE AND ELIGIBILITY.

32. **Acceptance of office.**—Whether one is chosen to public office by election or by appointment, his title is not complete and unquestioned until he accepts and qualifies. Acceptance may be presumed from the fact of entering upon the duties of the office or it may be formal by speech or letter of acceptance as is done in the case of nominations, although the acceptance of a nomination is not the acceptance of an office.⁵⁴ The best evidence of acceptance is legally qualifying for the office, for this leaves no room for doubt as to the intention to accept or the fact of acceptance.

33. **Is acceptance compulsory?**—Although in England there are numerous decisions holding that acceptance of office is not voluntary but compulsory, the rule cannot be regarded as so well established in this country. In theory there is no convincing reason why, if the state has the right to compel its citizens to serve in the army, it may not also, if deemed necessary, compel them to serve in civil offices, because if not it may be unable to perform the duties which as a state it is under obligation to perform. The question would seem to be whether or not it is expedient for the state to enforce such a rule, rather than a question as to the right of the state to adopt and enforce such a rule, provided that in its judgment such

⁵⁴ *Smith v. Moore*, 90 Ind. 294.

a rule is necessary. Though a provision in the Constitution compelling acceptance of office would remove all doubt, in the absence of such a provision, it would seem that the legislature has the power to compel acceptance, and that the courts may enforce it as a common law obligation.

The leading American case on this point is *People ex rel. Ins. Co. v. Williams*.⁵⁵ In this case a mandamus was sought to compel Thomas C. Williams to accept and perform the duties of the office of town clerk in the town of Mount Morris, County of Ogle, Illinois. There was no question that Mr. Williams possessed the requisite qualifications, or that he had been legally elected. The constitution and statutes of Illinois were silent, except that the statutes provided a penalty for refusing to serve, and it was argued by the respondent that this remedy was exclusive, but the court did not take this view. Insisting that the duty to serve was a common law obligation which the court could enforce, it granted the writ of mandamus. The court says: "It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the duty imposed by its laws and necessary to the exercise of the functions of government."

⁵⁵ 145 Ill. 573, LEADING ILLUSTRATIVE CASES.

34. **Who are eligible to office.**—If those must serve who are drafted and eligible, it becomes necessary to inquire who are eligible. The eligibility of some few is fixed by the Constitution of the United States. With regard to the President it fixes the tests of age, nationality and residence, the provision being as follows: "No person except a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident of the United States."⁵⁶ Although no case has ever forced a decision of the question, it is generally argued that a child born abroad but subject to the jurisdiction of the United States, as would be the case of the child born abroad to an American diplomatic or consular officer, would be eligible to the office of President. As the Vice-President may at any time succeed to the duties of the Presidency, the requirements as to his eligibility are the same. The Constitution fixes also the qualifications as to age and residence of Congressmen and Senators.

The provisions fixing the qualifications of some few of the more important state officers are found in the state constitutions, but the qualifications of by far the greater number of officers are to be found in the statutes. Where the constitutions have provided specific qualifications these may of course not be varied by the statutes, but if the qualifications provided in the constitutions are merely general, as that no one

⁵⁶ Art. II, § 5.

shall be entitled to hold office who is not an elector, the statutes may in such cases provide additional qualifications.⁵⁷

Whether the officer must be eligible at the time he is chosen, or it is sufficient that he be eligible at the time he is to enter upon the duties of his office, is a question about which there is a difference of opinion, the more common view being that eligibility means "capacity to be chosen" and hence that the time at which the test is to be applied is the date of election or appointment. While the majority of cases so hold, this does not seem to be the more logical view. What would seem to be the purpose of the legal requirements is to provide that no one not qualified should be exercising the duties of an officer. This would logically mean fitness at the time he is actually exercising the duties of the office and not at some time in the past when he was not exercising or attempting to exercise the duties of the office. This reasoning applies to disqualifications which are fully within the power of the candidate to remove by the time his term of office is to begin, and would not apply to a property qualification which he might not be able to satisfy by the time he is to enter upon the duties of the office. Where a given age is required, but the statute does not say expressly that "no one shall be elected to the office who shall not have attained the age of—years," it is sufficient that the officer shall have attained that age at the beginning of his term. The holding of an incompatible office at the time of election should not disqualify the candidate if there

⁵⁷ *Barker v. People*, 3 Cow. 686 (N. Y.).

is an intent to resign that office and accept the one for which he is running.

The leading case upon this point is that of *Smith v. Moore*,⁵⁸ the main facts in which are: In the general election Nov. 7, 1882, Smith, Moore and Finly were candidates for the office of treasurer of Benton County for the term of two years commencing Aug. 15, 1883. Smith received a majority of all votes cast and had a certificate from the board of canvassers to that effect, but he had been elected justice of the peace for a term of four years commencing Nov. 29, 1878, was duly commissioned, qualified and was discharging the duties of his office at the time of the general election of Nov. 7, 1882. The court held that this did not render him ineligible to election to the office of treasurer, notwithstanding the fact that the Indiana constitution provided that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of profit or trust under the state, other than a judicial office." It decided further, overruling the court below, that his re-election to the office of justice of the peace in April, 1882, which he refused, on Nov. 27, 1882, to accept, did not disqualify him for the office of treasurer. The court says:

"When appellant entered upon his term as justice of the peace, on the 29th day of November, 1878, he became, during the continuance of that term, disqualified to hold and perform the duties of any public office, except a judicial one. But while he could not, during that term, hold or perform the duties of a public office, other than judicial, it does not follow

⁵⁸ 90 Ind. 294.

that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice. Suppose that the judicial term had ended on the 8th day of November, 1882, * * * could it be said with reason that appellant might not have been voted for and legally chosen to the office of county treasurer for a term to begin in August, 1883? If so, then the office of justice of the peace disqualified him from holding and performing the duties of that office, not only during the term for which he was elected a justice of the peace, but for almost two years after the expiration of that term. Such a construction would make the Constitution read that no person elected a justice of the peace shall, during the term for which he shall have been elected, be eligible to be voted for for any office, except a judicial one. Such a construction, we think, is not compatible with sound reason nor a proper interpretation of the Constitution."

35. Age qualification.—It is a common law rule that for offices requiring discretion, and not simply involving ministerial duties, one to be eligible must have attained his majority. A number of our constitutions provide that in order to be qualified to hold office one must be an elector, and where it is not found in the constitution it may be provided by statute. This means that the candidate must be at least twenty-one years of age, and for the higher offices a higher limit is fixed, as for President of the United States, Senators, Congressmen, governors, etc. Not only is a minimum age limit fixed, but in many cases a maximum limit as well. This is more common in the case of judges than other officers and is usually

seventy years. Though minor judicial officers such as surrogates and justices of the peace are not included in a general provision of this sort as to judicial officers, county judges are.⁵⁹ The federal statutes make provision for retiring justices of the supreme court at the age of seventy, but does not make retirement at that age compulsory.

36. Citizenship as a qualification.—Though generally required by either the constitution or statutes, and implied in the case of elective offices, citizenship is not in all cases necessarily implied.⁶⁰ The election laws of a number of the states permit men to vote who are not citizens of the United States, and these men may, in the absence of statutes, fill minor federal offices; but where the statutes make citizenship a qualification this requirement must be met. If, in addition to citizenship, residence is required, this condition must be complied with in order to render one eligible.⁶¹ What constitutes United States citizenship is defined in the Fourteenth Amendment to the Constitution and citizenship in the various states is defined either in their constitutions or statutes. Residence is sometimes defined in the statutes and sometimes left to the courts to decide according to their own rules of interpretation.

37. Sex as a qualification.—Where the holding of office is confined to electors, by constitutional or statutory provision, the question of the eligibility of women to hold office is a simple one, as there can be no doubt as to their ineligibility in those states where

⁵⁹ *People v. Brundage*, 78 N. Y. 403.

⁶⁰ *State v. Wilson*, 29 Ohio St. 347.

⁶¹ *Paterson v. Miller*, 2 Metc. 493 (Ky.).

only male citizens are allowed to vote, or as to their eligibility in states where they are allowed to vote and electors are eligible to hold office. Where the constitution does not expressly disqualify women, the question is one for statutory regulation and such statutes may operate retrospectively to qualify them. The courts have, however, adopted the rule of construing strictly statutes making women eligible to hold office.⁶² There is, however, conflict on this point.⁶³ The common law right of a woman to hold office in England is thus stated by Throop on Public Officers, § 68: "So it has been said that the grant of an office of government, which may be exercised by a substitute or deputy, to a woman, will be good, as a woman may be made regent of the kingdom. So an office of inheritance may descend to a woman, and by consequence may be granted to her, as the office of marshal of England. So a woman may be a gaoler, or a commissioner of the sewers; so she may have custody of a castle; so she may be a forester, who shall make a deputy to attend the eyre, and he shall there be sworn. A woman may be sexton of a parish, and may vote in the election of one. So a woman may be overseer of the poor. Ann, countess of Pembroke, held the office of hereditary sheriff of Westmoreland, and exercised it in person; at the assizes she sat with the judges on the bench. The question as to the right of a woman to hold office in England was discussed at length in a very celebrated case, recently decided by the court of Queen's Bench, wherein it was held

⁶² *Matter of Bradwell*, 55 Ill. 535.

⁶³ *Jeffries v. Harrington*, 11 Colo. 191.

that a woman was incapable of being elected a member of a county council."

In § 69 he thus sums up a woman's common law right to office in the United States: "In some of the states of the Union, the right of suffrage, and the power to hold office generally, or to hold particular offices, have been conferred expressly upon women; but in those where the Constitution does not confer that power, the question whether a woman is competent to hold a public office, has arisen in several cases. In accordance with the English decisions it has been ruled that a woman cannot hold a judicial office, for example, that of justice of the peace. But where a statute provides that no person shall be debarred from any 'occupation, profession, or employment' on account of sex, and the Constitution contains nothing to the contrary, a woman may hold an office pertaining to the administration of justice, as that of master in chancery. In the absence of any constitutional prohibition, a statute authorizing a woman to be a member of a school committee is valid. 'The common law of England, which was our law upon this subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them.' A statute, conferring upon a woman the right to hold an office, is valid, although enacted after a judgment that she was ineligible. In the absence of any express constitutional or statutory provision on the subject, a woman cannot hold the office of jailer, or of director of a workhouse. The Constitution and Statutes of the United States contain no provision

expressly or impliedly prohibiting a woman from holding office under the authority of the United States; and appointments of women to national offices of a minor character are frequently made.”

38. **Property qualifications.**—Though the Federal Constitution provides no property qualification for the holding of office and very few of our state constitutions provide any, such qualification may in the absence of constitutional inhibitions be required by statute, as is done in several states. In *State ex rel. Thompson v. McAllister*⁶⁴ a statute requiring councilmen to be freeholders was held constitutional. The Constitution merely provides that “no person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal.” The court did not consider this as providing that all electors would be eligible to hold office, as was contended by counsel. It quotes with approval the language of the Supreme Court of Colorado, in *Darrow v. People*,⁶⁵ construing a similar constitutional provision: “The right to vote and the right to hold office must not be confused. Citizenship and the requisite sex, age and residence constitute the individual a legal voter, but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office; and certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the Constitu-

⁶⁴ 38 W. Va. 485.

⁶⁵ 8 Colo. 426.

tion by this provision intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualification should ever be demanded and no other disqualifications should be imposed."

Where property qualifications are required as a prerequisite to the right to hold office, it is upon the theory that the ownership of property in a community is evidence of an attachment to and interest in that community and that this will serve to make one a more zealous and efficient officer. It is not for the purpose of fostering class distinctions. It tends to guarantee greater conservatism among public officers, which of course has its advantages and disadvantages, and on which side the balance will fall depends upon the type of mind striking the balance.

39. Educational qualifications.—Although no test is absolutely accurate for the purpose of determining in advance who will make an efficient public officer, educational qualifications constitute a more logical test for determining one's fitness to perform the duties of a public office than do property qualifications. A civil service examination will sift out those who are absolutely incapable of performing the duties of an office, while a property qualification will leave many of them in. To the mind of the ultra conservative the educational test is not as desirable as the property test. The power of the legislature to impose it is, however, the same. In *State v. Covington*,⁶⁶ the court in interpreting a provision of the Consti-

⁶⁶ 29 Ohio St. 102.

tution that "no person shall be elected or appointed to office in this state unless he possesses the qualifications of an elector," laid down the rule that such a provision "does not by implication forbid the legislature to require other reasonable qualifications for office," and held that the legislature might provide that the ability to read and write should be a qualification for holding office.

40. **Religious qualifications.**—Our constitutions, practically without exception, forbid religious "tests" as a qualification for holding civil office. In the face of such provisions a statute providing any qualification which the courts would interpret as a religious test would be declared null and void. A provision requiring an oath of office is not repugnant to provisions in constitutions against religious tests.

41. **Loss of qualifications.**—The possession of the necessary qualifications by a public officer at the beginning of his term does not of course insure that these qualifications will continue until the end of his term. Where good moral character is a necessary qualification it may be lost by the commission and conviction of crime and this would result in the loss of the legal right to continue in office.⁶⁷ Where residence within the district is a necessary qualification, moving out of the district with the intent to remain, which intent may be inferred from the facts, is sufficient to cause a vacancy in the office.⁶⁸

42. **Disqualifications.**—The constitutions and statutes not infrequently proceed in a negative way

⁶⁷ *Barker v. People*, 3 Cow. 686 (N. Y.).

⁶⁸ *Prather v. Hart*, 17 Nebr. 598.

and provide disqualifications. Where the disqualifications enumerated by the constitution are intended to be exclusive, the statutes may not add to them. Where such is not evidently the intent of the makers of the constitution, the legislature is free, in the absence of specific prohibitions, to add such disqualifications as in its judgment are necessary. Where such disqualifications are provided in the statutes the courts in construing them follow the rule of strict construction.⁶⁹

The acceptance of an incompatible office amounts at common law to a disqualification and in addition is frequently made so by statute. Offices are incompatible where, though the holding of the two and performing the duties thereof may be physically possible, the temptation not to perform the duties of both in an impartial manner is so great that ordinary human nature cannot stand the strain. Take, for instance, the offices of governor of a state and mayor of a city, where as governor it might become one's duty to remove himself as mayor. In discussing this the Supreme Court of Michigan says in *Moreland v. Common Council*:⁷⁰ "If a superior officer is clothed with power to remove from office an inferior officer, there is certainly no logic or reason in holding that one person may hold both. No more marked incompatibility is possible. We have been unable to find a decision which holds that one person may hold two offices, in one of which he is clothed with power to remove the person holding the other. It follows that

⁶⁹ *State v. Cosgrove*, 34 Nebr. 386.

⁷⁰ *State v. Weston*, 4 Nebr. 234; *Rex v. Jones*, 1 B. & Adolph. 677 (Eng.).

the offices of mayor and governor are incompatible.” But where the functions of the two offices are not inconsistent and there is no constitutional or statutory inhibition against the same person holding two offices, the fact of holding one does not disqualify for holding the other. This may be considered a settled rule of the common law.

43. **Unfitness as a disqualification.**—While it is difficult in many cases to define the degree of intelligence and training necessary to qualify one to hold office, the civil service rules make an attempt to do this; and even with regard to officers not under civil service the common law and statutes make some attempts in this direction. Judges are required to be “learned in the law” and attorneys are required to pass certain examinations before being admitted to the bar. Upon this subject Throop on Officers says in §71:

“The common law declares that unfitness, if gross and palpable, is a disqualification for holding an office. Thus it has been said:

“‘If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king’s revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi* (for the welfare of the king and people); for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people.’ It is needless to say that the practical appli-

cation of this doctrine is generally very difficult, and, as far as our examination has extended, there is but one case in the United States where it has been applied. That case arose in the court of common pleas for the City and County of New York. A person, who was ignorant of any foreign language, had been appointed interpreter for one of the district courts of New York City, and brought an action against the city to recover his salary. It was held that he could not recover. The court said: 'In a case of a person duly appointed to an office or public employment, the rule undoubtedly is that the fitness of the appointment cannot be questioned, if he satisfies the appointing authority, in an action for the compensation attached to the office or employment, if such person performs or is ready to perform the duties required of him in his position. But the present is the case of one alleged to be wholly incompetent. There is no attempt to prove that the plaintiff is unsuited or unfit for the position he held, except in the sense of being at all times unable to perform its duties. By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of a fraud, either upon the officer who appointed him, and upon the public from whom he was to receive compensation, or upon the latter alone.' "

44. Bribery as a disqualification.—In England one is by statute disqualified to hold office if he has resorted to bribery to procure it. The promise by a candidate to accept less than the regular salary is generally held to amount to bribery. It is conceded in all the cases that such offers are legally not to be distinguished from direct offers of pecuniary reward for a vote, and in some of the cases the transaction

is likened to the sale of the office.⁷¹ The same is true where one promises to appoint another a deputy provided he will withdraw as a candidate for the office,⁷² though it was held in such a case that conviction was necessary to render the defendant ineligible. The court says: "But the unlawful agreement did not of itself render the appellee ineligible to the office to which he was afterwards elected. It is true that ineligibility to hold the office to which the person violating 2327, *supra*, is chosen is declared to be one of the penalties for the violation of the section. These penalties, however, attach only to one who has been duly charged with, and convicted of, the misdemeanor created by the statute. It is expressly declared that, 'upon conviction thereof' the person violating the statute 'if nominated shall be ineligible to hold such office.' The provision of the statute differs materially from 6, article 2, of the Constitution. The latter makes the fact that the candidate at a popular election has given or offered a bribe, threat, or reward to secure his election an absolute disqualification for holding the office for the term for which he has been elected. It has been said to be 'self-executing.'"⁷³ But the penalty of the statute in this case becomes effective only after trial, conviction and judgment have taken place.

45. Other crimes as a disqualification.—Duelling is another crime which disqualifies. The constitutions of Virginia and Kentucky contain provisions dis-

⁷¹ Throop, *Public Officers*, § 76; *Robertson v. Robinson*, 65 Ala. 610, **LEADING ILLUSTRATIVE CASES.**

⁷² *Gray v. Seitz*, 162 Ind. 1.

⁷³ *Carroll v. Green*, 148 Ind. 362.

qualifying for this offense, and in *Royall v. Thomas*⁷⁴ it was held that one so engaged might be removed by quo warranto without waiting for a trial and conviction in a regular criminal proceeding. But in *Commonwealth v. Jones*⁷⁵ the opposite view was taken by the court. It would take too long to enumerate the various constitutional provisions disqualifying for the commission of crimes therein specified. One particularly interested in this phase of the subject is referred to § 223 of Stimson's American Statute Law.

⁷⁴ 28 Grat. 130 (Va.).

⁷⁵ 10 Bush 725 (Ky.).

CHAPTER V.

DE FACTO OFFICERS.

46. **Who are de facto officers.**—The subject of disqualifications of officers brings us to that of de facto officers, as one who would otherwise be a de jure officer may as a result of some disqualification become a de facto officer. The disqualification should not be such that the one exercising the duties of the office has no color of title, for in this case he would be a mere intruder, and an intruder is not a de facto officer, although he may by acquiescence become such. As said by the court in the case of *State v. Taylor*:⁷⁶ “A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when, without color of authority, he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency.”

⁷⁶ 108 N. C. 196.

The de facto officer is therefore distinguished from an intruder in that he had, when he took the office, color of title or has acquired certain rights by the acquiescence or laches of the public; and from a de jure officer in that he has not complied with all of the legal requirements necessary to give him perfect title or, having once complied with them, has for some reason ceased to possess all the necessary qualifications, yet continues to exercise the office. But as said by the court in the last cited case: "It is difficult to define in precise terms what constitutes an officer de facto in all cases. Indeed, what may constitute such officer in one case may not in another. A variety of facts and circumstances, tending to show authority of the person claiming and exercising it, go to constitute such officer, and, upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts."

47. **Effects of acts of de facto officers.**—The necessities of business demand that the acts of de facto officers should be recognized by the courts as valid. Any other rule would create such uncertainty as to property rights as to be intolerable. If a decision of a judge, in a court of last resort, determining the title to property, could be set aside when, years after, it was discovered that he was a de facto officer only, a whole chain of titles might be destroyed, for in the meantime the property may have passed through scores of hands. The same result would follow if the acts of a de facto sheriff who sells property under execution could be subsequently set aside upon discovery that he was a de facto officer merely. It

might even involve the right of liberty or security of life and limb. In the case of *Nofire v. United States*,⁷⁷ the validity of an indictment in the circuit court of the United States depended upon the validity of the marriage of the murdered man into the Cherokee Nation, and the validity of this marriage depended upon whether the son of the clerk who granted the marriage license was a mere intruder or a *de facto* officer whose acts were valid. The court decided that the son of the clerk, though neither clerk or deputy, had nevertheless exercised the office for so long that he had become an officer *de facto*. Thus the license and marriage were valid, the circuit court was without jurisdiction and the conviction of murder was set aside.

48. **Possession necessary.**—It follows from the nature of a *de facto* officer's title that he must be in possession and exercising the functions of the office, for if the *de jure* officer, provided there be one, is in possession of the office, he is both *de jure* and *de facto* officer, and there can then be no other *de facto* officer, as two persons cannot be *de facto* officers for the same office at the same time.⁷⁸ Where the right to an office rests, as in the case quoted, upon the fact of exercising the duties of it, and as this necessitates being in possession so that the public would act upon the supposition that they are dealing with a *de jure* officer, the fact of possession is indispensable, the very life-blood of the claimant's title to consideration as an official. But this possession

⁷⁷ 164 U. S. 657.

⁷⁸ *McCahon v. Commissioners*, 8 Kan. 837.

need not of course be continuous physical possession,⁷⁹ but rather such possession as would be exercised by a de jure officer under ordinary circumstances.

49. Powers, rights and duties.—The powers of a de facto officer, while he continues in the exercise of the office, are the same as those of a de jure officer. His rights differ in some very important respects. He may not sue and collect compensation for his official services, because in order to do so he would first have to prove title to the office, which of course he cannot do. In discussing this point, the Supreme Court of Illinois says, in *People ex rel. Winstanley v. Weber*:⁸⁰ “While the acts of an officer de facto are valid, in so far as the rights of the public are involved and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer de facto. To do this he must be an officer de jure. As an officer de facto he can claim nothing for himself.” If the de facto officer has collected the salary he may be required to pay it over to the de jure officer. This rule is laid down with great clearness by the Supreme Court of New York in the case of *Nichols v. Maclean*:⁸¹ “The exclusion of a de jure officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good

⁷⁹ *Braid v. Theritt*, 17 Kan. 468; *Conover v. Devlin*, 24 Barb. 587 (N. Y.).

⁸⁰ 89 Ill. 347.

⁸¹ 101 N. Y. 526, LEADING ILLUSTRATIVE CASES.

faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the de jure officer can recover against the intruder the damages resulting from the intrusion, and that as a general rule the salary annexed to the office and received by the defendant measures the loss."

The de facto officer has a right to protection in the exercise of official duties and to use force against those who resist him to the same extent as a de jure officer.⁸² Third persons may be indicted for resisting a de facto officer.⁸³ The duties of a de facto officer are the same as those of a de jure officer. No one can hold himself out as a public officer without becoming liable for the performance of all the duties of the office. He is liable both for misfeasance and nonfeasance, and when ordered by a writ of mandamus to perform a duty which as a de jure officer he could be compelled to perform, it is no defense for him to set up his lack of title to the office. This is another way of saying that he may not impeach his title to office.⁸⁴ Not only is a de facto officer liable for his non-performance of duties to the same extent that a de jure officer would be, but the same is true as to the liability of his bondsmen.⁸⁵

⁸² *State v. Dierberger*, 90 Mo. 369.

⁸³ Vol. I, *Bishop Crim. Law*, § 464, 8th Ed.; *Bohannon v. State*, 89 Ga. 451.

⁸⁴ *Neale v. Allegheny Tp. Overseers of Poor*, 5 Watts 538 (Pa.).

⁸⁵ *Boone County v. Jones et al.*, 54 Ia. 699.

CHAPTER VI.

COMPENSATION OF OFFICERS.

50. **In general.**—It is almost a universal rule in the United States to provide for compensating public officers for their services. The right to compensation rests not on contract or common law, but upon statutory or constitutional provisions. If no such provisions exist, the officer has no rights to compensation either against the state or against private individuals to whom he has rendered the service.⁸⁶ A failure to perform a part of the duties of the office may be sufficient cause for removal of an officer, but so long as he is not lawfully suspended or removed, it will not affect his compensation.⁸⁷ An entire abandonment of the office will, however, forfeit one's right to compensation.⁸⁸ As a failure to perform a part of the duties will not lessen the compensation, so the requirement of additional duties will not entitle an officer to extra salary, unless such duties are entirely outside the scope of the office to which the salary is attached. But in cases where an officer is required to perform duties extrinsic to those of his office, there is no right to extra compensation unless there is a promise, express or implied, to pay.⁸⁹

⁸⁶ *Croft v. Brandt*, 58 N. Y. 106; *Sikes v. Hatfield*, 13 Gray 347 (Mass.).

⁸⁷ *Leonard v. City of Terre Haute*, 93 N. E. 872; *Reising v. City of Portland*, 111 Pac. 377.

⁸⁸ *Barbour v. U. S.*, 17 C. C. 149 (U. S.).

⁸⁹ *Andrews v. U. S.*, 1 Fed. Cas. No. 381.

51. **Not a contractual right.**—That the right to compensation for official services by a public officer does not rest upon contract may readily be concluded from the fact that when the office is abolished the right to compensation ceases. If the right rested upon contract, it would not cease until the expiration of the term provided in the contract, as the abolition of the office would not be permitted to work an impairment of the obligation of the contract. If the right to compensation were contractual, the contract could not be made more onerous without entitling the officer to extra compensation.

52. **When protected by constitution.**—Although the exact amount of the salary of public officers is rarely fixed by the constitutions, that being in practically all cases left to the legislatures, it is not so unusual for the constitution to provide that the salary shall not be diminished during the term of office. Such a provision is contained in the Federal Constitution in regard to the justices of the supreme court and of the inferior courts. It is as follows: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their term of office."⁹⁰ The intent of this is to prevent the legislative branch from coercing the judiciary by a threat to reduce their pay or by actually reducing it. Though there is no remedy in case Congress were to refuse to appropriate anything for the salaries of judges, it is not probable that

⁹⁰ Art. II, § 1.

a Congress will be found in which a majority would be willing openly to violate a plain and unequivocal provision of the Constitution. In all systems of government, something must be left to the reasonableness of men.

The provision in regard to the salary of the President differs from the above in that it forbids an increase as well as a diminution during his term of office. It reads: "The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within the period, any other emolument from the United States, or any of them." This is clearly intended not only to prevent coercion either by threats to lower or an actual lowering of his salary, but to prevent a corrupt influencing of his action by promises of an increase of salary. The idea in both provisions is to make the executive and judiciary independent of the legislative branch of the government. Where a President is elected for a second term he may receive a higher salary during that than he did during his first term. This happened in the case of President Grant.

Some of the state constitutions have gone much further than the Federal Constitution in the matter of fixing salaries, just as they have in a great many matters which should be left to ordinary legislation. It is indicative of a distrust of their legislatures and is particularly noticeable in the newer states. A constitutional provision fixing salaries at specified amounts is undoubtedly a mistake, since it makes it

too difficult to adjust salaries to the changes in the cost of living. An example of this is to be found in the constitution of Nebraska, adopted in 1875, and still in force. It fixes the salaries of governor, auditor, and treasurer at \$2,500 each per annum, and those of the attorney-general, superintendent of public instruction, and secretary of state at \$2,000 per annum. Though nearly everyone recognizes that these salaries are now grossly inadequate because of the increased cost of living, the inertia has been too great to permit a change of the constitution so as to readjust them to the present standard of living. The theory of the American government in fixing the salaries of its officers is based upon the principle that salaries of public officers should be sufficient in amount to permit a poor man to accept office.

53. **Assignment of salaries.**—Though there is no objection to the assignment of a salary already earned, the courts do not countenance the assignment of officers' salaries yet to be earned. The reason for this rule is that officers will render more efficient service by reason of having a greater interest in their work when there is money still due them in the way of salary than if there is nothing still due. Though this rule would not hold if all officials acted in accordance with the highest standard of ethics, common observation teaches us that it does hold, and that public policy demands that so obvious a fact be recognized. In discussing the rule, Justice Johnson of the Court of Appeals of New York says, in the case of *Bliss v. Lawrence*:⁹¹

⁹¹ 58 N. Y. 442.

“Salaries are, by law, payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.”

54. Salaries not attachable.—Neither are the salaries of public officers, while still in the hands of the government, attachable by the creditors of such officers. If such a practice became common, it would consume a considerable portion of the time of the official upon whom the writs were served and would to that extent divert his attention from the performance of the duties of his office. Presumably, his time is worth more to the public when performing the duties of his office than when acting partly as a private collecting agency. The Supreme Court of the United States, speaking through Justice McLean, in the case

of *Buchanan v. Alexander*,⁹² states the rule and the reason for it as follows: "The important question is whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot in this respect be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service."

55. **Pensions.**—As an incentive to more faithful service and accepting of office at lower salaries, the state may provide a system of pensioning its public officers. In the military and naval service this is a familiar practice, but as yet it has not become at all common in our civil service. If it can be considered as a part of the compensation for services, the legislature has the power to provide for it and may pay it out directly through its own agents or through a private association.⁹³ But, where it may be considered a mere gratuity, as where it applies to officers whose term of service ended before the law was passed, the power of the legislature has been ques-

⁹² 4 How. 20 (U. S.).

⁹³ *Commonwealth v. Walton*, 182 Pa. 373.

tioned, and in the case of *Mahon v. Board of Education*⁹⁴ it was held that under these conditions the legislature did not have the power. Pensions, like salaries, are not claims in which there is a vested right, and unless protected by the Constitution they may be discontinued by the legislature at any time.⁹⁵ To quote from the opinion of the Supreme Court in *United States v. Teller*: "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion." In support of this conclusion it cites *Walton v. Cotton*.⁹⁶

⁹⁴ 171 N. Y. 263.

⁹⁵ *United States v. Teller*, 107 U. S. 64.

⁹⁶ 19 How. 355 (U. S.).

CHAPTER VII.

POWERS OF PUBLIC OFFICERS.

56. **Classification of powers.**—The powers of public officers are either express or implied, that is, they are either set forth explicitly in the Constitution or statutes or implied from these express powers or from the common law powers of similar officers. Of course if the office is a new one, not known to the common law, as for instance that of railway commissioner, we must then look to the Constitution and statutes exclusively in order to determine the powers which such an officer may legally exercise. In case of a common law office, the Constitution or statutes may of course expand the powers of the officer, but if they create the office by name and are silent as to the powers, it will be presumed that they are the same as at common law. There are comparatively few officers whose powers are fixed in the Constitution. In order to make changes reasonably easy and to keep the Constitution from becoming too voluminous a document, the work of prescribing the powers of officers is in the great majority of cases left to the legislature. The Federal Constitution defines the more important powers of the President; in a general way, of the members of Congress, by defining the powers of Congress; and of the Supreme Court judges, by defining the jurisdiction of the Supreme

Court. That is, it defines in part the powers of a few score of federal officers, leaving the powers of the several thousand others to be defined by statute.

57. **Territorial limitations.**—The right of a public officer to exercise any powers at all are limited to the district within which he has jurisdiction; outside of that area his powers are the same as those of any other private citizen, unless otherwise provided by Constitution or statutes. In discussing this subject the Supreme Court of Rhode Island, in the case of *Page v. Staples*,⁹⁷ thus sets forth the law: "We do not think that the defendant can justify the taking of the plaintiff through a part of Kent County for the purpose of committing him to the jail in Providence County. In the absence of statutory provisions, the power of a sheriff is limited to his own county. He is to be adjudged as sheriff in his own county and not elsewhere. He cannot, therefore, execute a writ out of his own county, and if he attempts to do so, becomes a trespasser. The only exceptions to this principle are, that having a prisoner in his custody upon a writ of habeas corpus, he has power, by virtue of the writ, to travel through other counties, if necessary, in order to take his prisoner to the place where the writ is returnable; and he may, also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county."

58. **Limitations due to personal interest.**—It is a well recognized principle of common law that a judge shall not sit in a case in which he has a personal interest, whether this be due to relationship, finances,

⁹⁷ 13 R. I. 306.

professional services, or other cause which would be likely to interfere with his deciding impartially. This is merely the legal recognition of a truism that men do not make good judges in their own case. In *Moses v. Julian*,⁹⁸ the court says: "The judge who is satisfied that he is legally disqualified to act in a case ought not to wait until the parties object to him, but should refuse to hear the cause, by an entry on the docket that he does not sit in the case. This is the immemorial practice of the courts and of constant occurrence." In this case a will was set aside because the judge before whom it was probated had acted as counsel in drawing it up. The same rule applies to administrative officers, and in *Good-year v. Brown*,⁹⁹ the court held void a title to property resting upon a warrant issued to himself by a deputy secretary of internal affairs, and awarded the land to the adverse claimant. "We presume it was innocent. Nevertheless, to litigants whose property is at stake, and to speculators, measuring the acts of men by the common business standards, it suggests possible dangers and temptations on which we will not enlarge. Such dealings by an officer are to be regretted because of their necessary consequences; and a proper consideration for the public security, and for the confidence of citizens in the officers of the state, forbid them. Whether we consider the interests of the citizens for whose security and protection the state exists, or the preservation of public confidence in the purity of the administration of

⁹⁸ 45 N. H. 52.

⁹⁹ 155 Pa. 514.

public affairs, or the honor and character of the officer as a public servant, the conclusion reached is the same. Public policy cannot tolerate such dealings by an officer within his own department or office. It will not uphold them."

59. Limitations due to separation of powers.—Though the principle of separation of powers into legislative, executive, and judicial is not strictly adhered to in the United States, there is nevertheless a sort of presumption against the exercise by the officials of one department of powers which properly belong in another department of government. Whether or not the power exercised is in violation of this principle, and if so, whether or not the violation is one forbidden by law or public policy, is in the last analysis a question for the courts. In some states the separation of powers is specifically provided for in the constitutions.

60. When powers exercised by boards.—If an official power instead of being exercised by one person is entrusted to a board of three or more, it must be exercised by them acting as a board. While it is not necessary that all concur in the action, it is necessary, in order that it be considered an action by the board, that all should have had notice of the meeting, that a quorum should have been present, and that a majority of the quorum should concur. In *Cooley v. O'Connor*,¹ the supreme court reversed a decision of the circuit court excluding a tax certificate on the ground that it was signed by but two of the three tax commissioners, and thus set forth the

¹ 12 Wall. 391 (U. S.).

rule as to the action of boards: "It is true that when an authority is given jointly to several persons they must act jointly or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."

Provided there is a quorum present, and the meeting otherwise regular, it is sufficient that a majority of those voting and not an absolute majority of the whole board vote in the affirmative. In *Rushville Gas Co. v. City of Rushville*,² the court was called upon to decide upon the legality of a resolution of the city council, the council consisting of six members, three of whom voted for the resolution and three did not vote at all. The following is the substance of the opinion of the court:

"The rule is that, if there is a quorum present and the majority of a quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one

² 121 Ind. 206.

would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of the inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is a declaration that they consent that the majority of the quorum may act for the body of which they are members."

But the board in order to make their action binding upon the body they represent must act as a board. This is very clearly brought out by the Supreme Court of Ohio in *McCortle v. Bates*.⁸ In this case five of the six school directors had without a meeting of the board signed an order for school apparatus. In support of the conclusion that such act would not bind the township, the court says:

"The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties, discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care, and custody of all school property

⁸ 29 Ohio St. 419.

whatever within their jurisdiction, and are invested with full power to control the same in such manner as they think will best subserve the interest of the common schools and the cause of education. They are required to prescribe the rules and regulations for the government of all the common schools within the township. Clothed with such powers and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be, restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided by the statute."

61. Acts in excess of authority.—Acts of public officers, whether acting as individuals or as a board, will not bind the governmental unit which they represent, unless within their authority or ratified by the body having authority to ratify them.⁴ Neither is it sufficient, as in the case of private agents, that they be within the apparent authority of the public officer; they must be within his actual authority. The reason for this is that the authority of public officers, unlike that of private agents, is defined by law and definite notice thereof is therefore accessible to all dealing with them. The person dealing with a public officer has, legally speaking, as good an opportunity as the officer himself to decide as to the extent of the

⁴ *Orange City v. Texas & N. O. R. Co.*, 35 Tex. Civ. App. 361, 80 S. W. 670.

officer's authority. In *Whiteside v. United States*,⁵ the Supreme Court of the United States, speaking through Justice Clifford, says in justification of this rule: "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act."

⁵ 93 U. S. 247.

CHAPTER VIII.

DUTIES OF PUBLIC OFFICERS.

62. **Classification.**—Official duties may be divided into discretionary and ministerial. Both alike are prescribed by law, either expressly or by implication, but differ in that ministerial duties may be delegated and may be compelled or restrained by the courts, while a discretionary duty may not, and the officer may be called to account only for an abuse of the discretion. The filing of a proper legal document by a clerk charged with that duty may be compelled by mandamus, as may the payment of a lawful claim by the official having custody of the money for that purpose, but the location of a bridge at one point on a stream rather than another, by commissioners having power to choose a site, will not be compelled by mandamus. These principles are so well established that it is unnecessary to cite authorities in support of them.

The courts will not by injunction restrain public officers in the exercise of discretionary duties, except for an abuse of discretion. In *Davis & Palmer v. Mayor of the City of New York*,⁶ the superior court sustained an injunction restraining the aldermen from granting a franchise to Jacob Sharp and others to operate a street railway in Broadway and charge five-cent fares, on condition that they pay a

⁶ 9 N. Y. Sup. Ct. 663.

license fee of \$20 a car per annum, notwithstanding there were other reliable parties willing to take the franchise at a license fee of \$1,000 per car per annum and three-cent fares. The court thus justifies its use of extraordinary power:

“As between two such propositions, there can be no pretense for saying that in the exercise of an honest discretion the former might be preferred to the latter. It is not a debatable question whether a license fee of \$1,000 per car per annum is more advantageous to the city than one of \$20, nor whether the interests of the community will be better subserved by each citizen being compelled to pay a fare of three cents, instead of five. Therefore, even if it can be successfully maintained that the common council had the power to make the grant which the resolutions purport to make, it would be a gross abuse of power, and a flagrant violation of public duty, to make the grant as it was made, instead of making it to those who would pay, at the least, an additional million of dollars for it into the public treasury, and exact from the passengers only three cents fare, instead of five. Is it incontestable that such an abuse of power and violation of duty cannot be restrained by any court?”

63. When only apparently discretionary.—An official duty may appear from the wording of the statute imposing it to be discretionary when it is really ministerial. For instance, a statute may provide that a city council or other taxing body may levy taxes up to a certain limit. This grant will under certain circumstances be interpreted to mean that the council or other body shall levy taxes up to that limit. Even

though the words, "may, if deemed advisable," which ordinarily confer discretionary power, are used, they will still be interpreted as "shall," provided the money is needed to pay contract debts. The courts will not allow taxing bodies, having the power to do so, to deem it inadvisable to make such levy as is necessary to pay valid debts, and will by mandamus compel them to perform their duty.

In *Supervisors v. United States*,⁷ the Supreme Court was called upon to interpret the following act: "The board of supervisors under township organization, in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent, upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness." Counsel for appellant insisted that this clothed the board with discretionary power, but the court, after citing *The King v. Inhabitants of Derby*, *Skinner*, 370; *King & Queen v. Barlaw*; *Mayor of the City of New York v. Furze*, 3 Hill, 614; and *Mason v. Fearson*, 9 Howard, 248, in which language ordinarily permissive was interpreted as mandatory, the court sums up the law as follows: "The conclusion to be deduced from the authorities is, that

⁷ 4 Wall. 435 (U. S.).

where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.”

64. Ministerial duties of judicial officers.—Where, as not infrequently happens, ministerial duties are performed by judicial officers, whose duties are in the main discretionary, performance of such ministerial duties is enforced in the same way as though they were to be performed by a ministerial officer. To hold otherwise would be to enable the legislature to deprive many people of their legal rights by casting ministerial duties on judicial officers. In *Grider v. Tally*,⁸ the plaintiff asked for a mandamus to compel the defendant, a probate judge, to grant a license to sell liquor in the town of Belleforte, “having first complied with all the requirements of the law in relation to the granting of license to sell liquor.” The mandamus was granted by the circuit judge and upon appeal his action was sus-

⁸ 77 Ala. 422.

tained by the supreme court of the state. The defendant still refusing to grant the license, the circuit judge issued an attachment directing the sheriff to take said Tally into his custody and "him safely to keep until he issued a license as prayed." The section of the Code providing for the issuing of licenses is as follows: "No license must be granted to sell vinous or spiritous liquor, unless the applicant produce to the judge of probate of his county, or to the person authorized by law to grant such license, the recommendation of ten respectable freeholders and householders thereof, residing within four miles of such applicant, stating that they are acquainted with him, that he is possessed of good moral character, and is in all respects a proper person to be licensed." In interpreting this provision, the court says: "No power is conferred on the probate judge to pass on the moral character of the applicant, or whether he is a proper person to be licensed, or on the propriety of issuing a license. He adjudges nothing—decides no question. On the production of the proper recommendation, taking and subscribing the prescribed oath, and paying the requisite amount, it is the clear and specific duty of the probate judge to issue the license."

For the purpose of distinguishing judicial from ministerial acts, the court lays down the following rule: "Judicial power is authority, vested in some court, officer, or person, to hear and determine, when the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication. Official action, the result of judgment or dis-

cretion, is a judicial act. The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing, is a ministerial act."

This case illustrates very well the inadvisability of casting ministerial duties upon judicial officers. It tends to bring the judiciary into disrepute, to make for the judge political enemies without sufficient compensating features. As the common feeling of the community is that a judge exercises discretion in his acts, his judgment should not be brought into disrepute by his being required to perform duties which must be performed in a particular way, regardless of what his judgment might dictate. A judge who has been put in jail for contempt is not likely to retain the respect of the community to the same degree as he previously possessed it, and respect for the judiciary is no mean force in securing obedience to and respect for law.

CHAPTER IX.

LIABILITIES OF PUBLIC OFFICERS.

65. **Protection of individual rights.**—In order that government may not be irresponsible, it is desirable that in so far as possible the individual citizen shall have recourse against an officer for a failure to perform duties owing to the individual citizen and that the public shall have recourse for duties owing to the public. The liability for a failure to perform the latter class of duties can be enforced only in an action by the state. The leading case on this point is that of *South et al. v. State of Maryland*.⁹ Here Potle, the real plaintiff in the original action, brought suit on the official bond of South alleging that he, South, as sheriff of Washington County, refused to give him, the said Potle, protection, and that by reason of South's failure to perform his official duty in keeping the peace of the state of Maryland, plaintiff was compelled to give to certain persons, who threatened his life, the sum of \$2,500. The court held that this was a "public duty for neglect of which he is amenable to the public, and punishable by indictment only."

66. **Liability of judicial officers.**—The class of officers against whom the rule of individual liability for their acts is most relaxed is that of judicial offi-

⁹ 18 How. 396 (U. S.).

cers. As regards judges there is no civil liability for their acts, provided they act within the limits of their jurisdiction. In *Randall v. Brigham*,¹⁰ the Supreme Court of the United States held that the removal of an attorney by the court was a judicial act, so decided in *Ex parte Secombe*,¹¹ and that "it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for a judicial act done within their jurisdiction. This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries and in this country ever since its settlement." The plaintiff had contended that "each individual of society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws," and based this contention upon Article X of the constitution of Massachusetts. He maintained that the terms "life, liberty, and property" include every right known to the law, and that "property includes those estates which one may acquire in professions, which are often the source of the highest emoluments and honor"; further, that "an attorney and counselor being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the

¹⁰ 7 Wall. 523 (U. S.).

¹¹ 19 How. 9 (U. S.).

legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." This language was quoted from the opinion of the Supreme Court in *Ex parte Garland*.¹² But in that case the removal was by an act of Congress and not by the court. The court admits that Mr. Garland, an attorney, could be removed from his office by the court for "moral or professional delinquency," and the undisputed facts showed "moral and professional delinquency" on the part of Randall in the former case. As to the civil liability of a judge for acts that are not malicious and not in excess of his jurisdiction, the question is no longer an open one; it has been decided that there is none and there is apparently no likelihood that there will be any change in the rule.

67. Liability for acts in excess of jurisdiction.—

Whether or not a judge is liable civilly for acts in excess of jurisdiction depends to some extent upon the character of court over which he is presiding. If the court is one of general jurisdiction the authorities are pretty generally of the opinion that he is not civilly liable for his acts.¹³ Thus in *Bradley v. Fisher*¹⁴ the court says: "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. In this country the judges of the superior courts of record

¹² 4 Wall. 333 (U. S.).

¹³ 7 Wall. 523 (U. S.).

¹⁴ 13 Wall. 335 (U. S.).

are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office.

“If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some states they may be suspended or removed without impeachment, by a vote of the two houses of the legislature.” In *Randall v. Brigham*, *supra*, the court expresses a doubt as to the exemption of judges for acts in excess of jurisdiction where the judge acts maliciously or corruptly. To quote the exact language of the court: “They are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly.”

There is also some conflict as to whether the exemption from civil liability accorded to judges of courts of general jurisdiction for acts in excess of jurisdiction extends also to judges of courts of inferior jurisdiction. Though the tendency at present is in this direction, the weight of authority is still in favor of the established rule that judges of inferior courts are not exempt from civil liability for acts in excess of their jurisdiction. In *Truesdell v. Combs*¹⁵ it was held that where a justice of the peace without authority of law issues a process for arrest he will be guilty

¹⁵ 33 Ohio St. 186.

of trespass, and honesty of purpose is no defense; or where a justice with full knowledge of the facts issues a warrant for arrest in case of a crime committed in another state, he is liable;¹⁶ or where a magistrate acts officiously in issuing a warrant for arrest without a complaint on oath or personal knowledge that a complaint has been made, is liable;¹⁷ or where a justice of the peace instigates the execution of a state warrant for felony nine months after the warrant has issued, the party who procured it having made no recent application to have it executed, the justice, being apparently actuated by malice, was held liable;¹⁸ also where a justice of the peace caused a suit to be instituted upon a promissory note of which he was the owner and made the summons returnable before himself, rendered judgment, and issued a writ of execution, and caused defendant's arrest and commitment to jail, he was held liable;¹⁹ and it was held in *Fisher v. Deans*²⁰ that a justice who commits a person to jail for the purpose of extorting money from him is liable for false imprisonment; but, on the contrary, it was held in *Austin v. Vrooman*²¹ that a justice of the peace is not personally liable in damages for erroneously deciding in good faith that he has jurisdiction to try a defendant who has offered bail for appearance before the grand jury and demanded a trial by jury after indictment,

¹⁶ *Miller v. Grice*, 2 Rich. L. 27 (S. C.).

¹⁷ *Flack v. Harrington, Breese* 213, 12 Am. Dec. 170 (Ill.).

¹⁸ *Garvin v. Blocker*, 2 Brev. 157 (S. C.).

¹⁹ *Dyer v. Smith*, 12 Conn. 384.

²⁰ 107 Mass. 118.

²¹ 28 N. E. 477 (N. Y.).

where the justice had jurisdiction of the offense and of the defendant except for such offer and demand. If, furthermore, the want of jurisdiction results from facts not within the knowledge of the magistrate, so that he did not know or had not the means of knowing that he was without jurisdiction, he is not liable.²² Courts of general jurisdiction are presumed to have jurisdiction until the contrary is shown.²³

68. Distinction between excess and absence of jurisdiction.—The authorities recognize a distinction between cases where there is an entire want of jurisdiction over the subject-matter and where jurisdiction is possessed for some purposes but is exceeded by extending it to cover more than was intended by statute. In the former case the whole proceeding is *coram non judice* (before one not a judge), and the judge is liable.²⁴ An example of this would be where a judge not misinformed as to the facts upon which jurisdiction depends were to issue a summons to be served outside his territorial jurisdiction and then punish for contempt the person who disregarded it. In such a case he would be liable to the person so punished.²⁵ But if the magistrate has no jurisdiction by reason of the existence of facts which he cannot be supposed to know, but which are peculiarly within the knowledge of the party aggrieved, the former is not liable if he has no actual knowledge of such facts.²⁶

²² *Calder v. Halket*, 3 Moore P. C. 28 (Eng.).

²³ *Piper v. Pearson*, 2 Gray 120 (Mass.).

²⁴ *Marshalsea's Case*, 10 Coke 68b (Eng.).

²⁵ *Houlden v. Smith*, 14 Q. B. 841 (Eng.).

²⁶ *Pike v. Carter*, 3 Bing. 78 (Eng.).

This distinction between an entire lack of jurisdiction and excess of jurisdiction is well brought out by the Supreme Court of the United States in *Bradley v. Fisher*,²⁷ where the court, speaking through Justice Field, says:

“Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is vested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain dis-

²⁷ 13 Wall. 335 (U. S.).

trict, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil actions for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reason."

69. Liability of judicial officers to the state.—But the fact that judicial officers may be exempt from civil liability to those injured by their malicious, corrupt, oppressive acts, and acts in excess of their jurisdiction, does not mean that they are exempt from all liability whatsoever. The state whose servant the judge is has a right to call him to account for the improper exercise of the power he possesses or an attempt to exercise power which he does not lawfully possess. The ordinary remedy in such a case is impeachment.²⁸ The difficulty of applying this

²⁸ *Pratt v. Gardner*, 2 Cush. 63 (Mass.); *Floyd v. Barker*, 12 Coke 23 (Eng.).

remedy has led to the advocacy, and in some states the adoption, of another method, and as this is one of far-reaching consequences in the administration of justice, and is at present a live issue, we feel warranted in discussing it.

70. Recall of judges.—Very recently, certain reformers have devised the plan of calling a judge to account for his official acts by forcing him to submit to a vote of the electors the question of whether or not he may be allowed to serve out the remainder of his term, and, unless he receives a plurality of the votes cast at the election called for the purpose, he is removed. This was made a national question by the refusal of President Taft to sign the bill admitting Arizona into the Union until the provisions for the recall of judges were eliminated from their constitution. It tends to render tenure too dependent upon the whims of the momentary majority, it decreases the efficiency of officers and makes it impossible to induce men best fitted for judicial position to accept office. It is unfair to the judge, for either one of two things will happen: the fitness or unfitness of the judge will be determined upon the basis of a single decision, or upon his whole career. The former is manifestly unfair and the latter is often impracticable, requiring more time for investigation than the voters can give. It injects too much politics into the judiciary, of which we are already suffering from an overdose. It sweeps away the protection which the minority has against hasty, tyrannical action by the majority and this protection is one of the tests of the advance in civilization which a people

has made. It would exercise a mischievous influence upon judicial procedure, as the judge would try his case in the newspapers and according to popular desires instead of in accordance with rules of procedure which the experience of mankind has shown to be useful in the administration of justice. It is unnecessary, because in cases of real as distinguished from fancied corruption or unfitness such as to warrant removal, impeachment is or can easily be made a sufficient remedy.

71. Liability of officers other than judicial.—Let us take first quasi-judicial or administrative officers. As to these, the general rule is that they decide questions as to the extent of their jurisdiction at their peril and are liable for injuries resulting from acts in excess of their jurisdiction. The decision of sanitary officers that a thing is a nuisance is as a rule considered a ministerial and not a discretionary act, and liability results from an erroneous determination in case of excess of jurisdiction. As said by the New York Court of Appeals in *People v. Board of Health of the City of Yonkers*:²⁹

“If the decisions of these boards were final and conclusive even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order abating an alleged

²⁹ 140 N. Y. 1.

nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.”

So in *Welch v. Stowell*,⁸⁰ city officers were held liable for destroying a building used as a house of ill-fame. The general principle underlying this decision is that where merely the use to which a thing is put, and not the existence of the thing itself, constitutes the nuisance, the abatement of the nuisance by the destruction of property is unwarranted, since the restraining of the use, which could be done by injunction, rather than by the destruction of property which is capable of a harmless, legitimate use, meets all the requirements of the case. It is the same principle which would render officers liable for the destruction of a barn near a spring because cattle were kept in it and the cattle polluted the water of the spring.

72. Conclusiveness of acts of quasi-judicial boards.—As to the conclusiveness of the acts of a quasi-judicial board the court says in *City of Salem*

⁸⁰ 2 Dougl. 332 (Mich.).

v. Eastern Railway Co.:³¹ "The record of proceedings of the board of health is competent evidence in the present case for some purposes. It proves the fact that such proceedings were had, which is a necessary preliminary step. So far as the proceedings were within and in accordance with the authority and duties of the board, they are entitled to the presumption that whatever was done was rightly done; and may be held as *prima facie* evidence of the existence of a nuisance which warranted the board of health in taking action and incurring expense for its removal. But it is not evidence that the nuisance was caused by the defendant, in the manner stated, or in any manner; and all the facts upon which it is sought to charge the defendant with liability are open to be tried and determined by the proofs in the case." And in *Mygatt v. Washburn*,³² where the plaintiff's property was placed on the assessment roll after July 1, when the roll was required by statute to be complete on that date, the assessors so acting were held liable for the damages resulting to plaintiff from their act. The court says:

"The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. As the board of supervisors was obliged by law to annex a tax to the name of every person assessed upon the roll, and to issue a warrant for the collection of the tax, the unauthorized act of the assessors was

³¹ 98 Mass. 431.

³² 15 N. Y. 316; also see *Potts et al. v. Breen et al.*, 167 Ill. 67, *LEADING ILLUSTRATIVE CASES*.

the means by which the property of the plaintiff was procured to be sold. They are, therefore, responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, the case of an error of judgment. It is a salutary rule, though in some cases, and perhaps in the one before us, it may operate harshly, that a subordinate officer is bound to see that he acts within the scope of the authority legally committed to him. The principle is too well settled to require a reference to authority; but its application to the case of assessment of a person not liable to taxation in the town or district in which the assessment is made has often been declared in the courts of this and other states."

73. Manner of acting as affecting liability.—It not infrequently happens that officers will be liable in case of summary action, as in the abatement of a nuisance, where in the same case they would not have been liable had an opportunity for a hearing been given. This is particularly true where the statute provides for notice and hearing. Where such opportunity has been given, the officers are then considered as having so acted that their decisions are in the nature of judicial determinations and they are not liable for error, even though their error may have resulted in loss to those affected by the decision. All that is necessary is that they comply with the statute and act in good faith. Thus, in the case of *Lee v. Huff*,³³ it was held that a county examiner was not liable for revoking the license of a teacher, after a hearing. The court says: "When under this statute a teacher has been cited to appear and answer

³³ 33 S. W. 846 (Ark.).

charges preferred against him, and when, after a fair investigation, the examiner honestly concludes that the teacher has been guilty of such conduct as, under the statute, justifies a revocation of his license, he is not liable for damages, whether his decision be correct or not. He must follow the statute under which he receives authority, but whether the evidence is sufficient to make out a proper case under the statute is for him to determine. The law reposes this discretion in him, and will protect him when he acts honestly and in the faithful attempt to discharge his duties." It quotes with approval the language of Judge Appleton of the Supreme Court of Maine, in *Donahoe v. Richards*:³⁴ "The general principle is established by an almost uniform course of decision that a public officer, when acting in good faith, is never liable for an erroneous judgment in a matter submitted to his determination. All he undertakes to do is to discharge his duty to the best of his ability and with integrity. That he may never err in his judgment, or that he may never decide differently from what some other person may think would be just, is no part of his official undertaking."

74. Liability for ministerial acts.—In case of ministerial acts there is the highest degree of liability. For acts of this character, provided the duty is not one owed solely to the public, the officer is liable for malfeasance, misfeasance, and nonfeasance, where his act results in damages to the one to whom he owes the duty. In *Amy v. Barkholder et al.*,³⁵ the

³⁴ 38 Me. 379.

³⁵ 11 Wall. 136 (U. S.); also see *State v. Gardner*, 54 Ohio St. 24, **LEADING ILLUSTRATIVE CASES**.

Supreme Court of the United States, speaking through Justice Swayne, says: "The rule is well settled that where the law requires absolutely an act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages, to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender." In this case the plaintiff was allowed \$12,108.03 for injury caused by reason of the failure of the defendants, who were supervisors of Des Moines County, to levy a tax, and this notwithstanding the fact that they were enjoined by the county court from levying the tax, and the statute making them individually liable for losses had been repealed. The county court was held to be without authority to enjoin them and the repeal of the statute to have no effect upon rights already vested under it.

75. What are ministerial acts.—This difference in liability for ministerial and discretionary acts makes it important to decide what are ministerial acts. For this purpose the test is whether or not the performance of the act can be compelled by mandamus.³⁶ In *Ex parte Batesville & B. Ry. Co.*,³⁷ the court has defined a ministerial act to mean: "One which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety

³⁶ *Grider v. Tally*, 77 Ala. 422; *Gillespie v. Palmer*, 20 Wis. 572, LEADING ILLUSTRATIVE CASES.

³⁷ 39 Ark. 82.

of the act done.” Also in *Bassett v. Atwater*:³⁸ “It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose.” Though there may be discretion in the manner of performing an act, it may still be regarded a ministerial act and compellable by *mandamus* if there is no discretion as to whether or not it shall be performed at all.³⁹ It does not follow that an act is not ministerial “because the person performing it may have to satisfy himself that the state of facts exists under which it is his duty to perform the act.”⁴⁰ With ministerial, as with discretionary, duties, if the officer keeps within his legal authority, his motives are immaterial.⁴¹

76. Liability for acts of subordinates.—Superior officers are not as such liable for the acts of their subordinates, whether the latter are employees or officers.⁴² In *Robertson v. Sichel*,⁴³ which was a case involving the liability of the collector of customs for a trunk lost through the negligence of one of his subordinates, the court lays down with clearness the rule: “The subordinate who was guilty of the wrong, if any, would undoubtedly be liable personally for the tort; but to permit a recovery against the collector, on the facts of this case, would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill posi-

³⁸ 65 Conn. 355.

³⁹ *Kendall v. United States*, 12 Pet. 524 (U. S.).

⁴⁰ *Flournoy v. Jeffersonville*, 17 Ind. 169.

⁴¹ *Spalding v. Vilas*, 161 U. S. 483.

⁴² *Hall v. Smith*, 2 Bing. 156 (Eng.); *Tracy v. Swartwout*, 10 Pet. 80 (U. S.), LEADING ILLUSTRATIVE CASES.

⁴³ 127 U. S. 507.

tions of the kind, if they knew that they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

This does not mean that the superior may not, by directions to his subordinates, or by selecting subordinates known to be irresponsible or incompetent, or by failing to require proper guarantees from them, become himself liable for their acts.⁴⁴ It is a rule of simple justice that officers are not liable for the acts of their predecessors.⁴⁵ All courts agree upon this proposition, and no discussion of its expediency is necessary.

77. Form of official liability.—The liability of public officers may be either criminal or civil, and the latter may be either on contract or in tort. Of course an officer is criminally liable for his acts in his capacity as an individual member of society, the same as any other citizen,⁴⁶ but what is meant here is his criminal liability for his official acts. This latter may be either common law or statutory liability. At common law the failure or neglect to perform a ministerial duty imposed upon him by law made the officer liable to indictment for a misdemeanor.⁴⁷ But in case of discretionary duties, a failure does not render the officer criminally liable unless it can be shown to be wilful or corrupt.⁴⁸ The statutes may

⁴⁴ *Dunlop v. Munroe*, 7 Cranch 242 (U. S.).

⁴⁵ *Vose v. Reed*, 54 N. Y. 657.

⁴⁶ *State v. McLean*, 121 N. C. 589.

⁴⁷ *Rex v. Commings*, 5 Mod. 179 (Eng.).

⁴⁸ *Rex v. Webb*, 1 W. Bl. 19 (Eng.).

provide for additional criminal liability, unless prohibited by the Constitution.⁴⁹ Such statutes, being penal, are construed strictly.⁵⁰ Where the statute penalizes only wilful or malicious conduct, mere neglect is not sufficient to bring the act within the statute.⁵¹ But under a statute making it an offense for an officer to give a certificate of receipt fraudulently, it is not necessary to prove intent to defraud the persons to whom it was given.⁵²

78. Liability on contract.—Officers are not liable upon contracts made in their official capacity unless the contract clearly shows they intended to assume a personal liability.⁵³ Unlike the agent of a private party, an officer will not incur individual liability by exceeding his authority, for as the extent of his authority is determined by law, those with whom he deals have the same opportunity as he to judge whether or not the act is within the scope of his authority.⁵⁴ His official bond being a personal contract, he is of course liable on it, and the extent of the liability is determined by the bond itself.⁵⁵ Any contract to turn over the duties of one's office to another, except as regards purely ministerial duties, is void. With regard to such a contract, the Supreme Court of Alabama said, in *Robertson v. Robinson*: "No judicial tribunal, so far as we can discover, has ever given countenance to any such agreement; and

⁴⁹ *Comlth. v. Williams*, 79 Ky. 42.

⁵⁰ *Dutton v. Phila.*, 9 Phila. 597.

⁵¹ *State v. Hein*, 50 Mo. 362.

⁵² *State v. Morse*, 52 Iowa 509.

⁵³ *New York & Charleston Steamship Co. v. Harbison*, 16 Fed. 688.

⁵⁴ *Hall v. Lauderdale*, 46 N. Y. 70.

⁵⁵ *Hoboken v. Harrison*, 30 N. J. L. 73.

if popular elections are to be kept free from the taint of selfishness and corruption—if public offices are to be dignified as public trusts, and the performance of official duty preserved from the contamination of unlawful and improper influences—all such agreements will be condemned.”

79. **Liability in tort.**—When one by virtue of his office seizes the property of another and in so doing acts in excess of his authority he commits a trespass and may be sued in tort for the resulting damages. Or, to put it in more general terms, where an officer acts ministerially and is bound to render certain services to individuals, as the execution of a writ or process, or is bound to render any services to individuals for a compensation in fees or salary, he is liable in tort, for misfeasance or nonfeasance, to the party injured by his acts.⁵⁶ Also where an individual is prevented by an officer from exercising a right which it is lawful for him to exercise, he has an action in tort for damages against the officer so hindering him.⁵⁷

80. **Exemption of legislative officers.**—It may be laid down as a fundamental principle of American and English jurisprudence that legislative officers are not liable personally for the injury caused by their legislative acts.⁵⁸ This immunity extends not merely to members of Congress and state legislatures, but to councilmen of a municipal corporation as well. As said by the court in *Jones v. Loving*:⁵⁹

⁵⁶ *South v. Maryland*, 18 How. 396 (U. S.).

⁵⁷ *Ashby v. White*, 2 Lord Raym. 938 (Eng.).

⁵⁸ *Baker v. State*, 27 Ind. 485.

⁵⁹ 55 Miss. 109.

"It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use."

But this immunity does not extend to slanderous remarks having no connection with the business at that time before the legislative body. This rule is well stated by the Supreme Court of Massachusetts in *Coffin v. Coffin*⁶⁰ in the following language: "And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander uttered by a citizen who is a representative as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privileges further than was intended by the people, or than is consistent with sound policy; and would render the representatives' chamber a sanctuary for calumny, an effect which never has been, and, I confidently trust, never will be, endured by any house of representatives of Massachusetts."

⁶⁰ 4 Mass. 1, LEADING ILLUSTRATIVE CASES.

CHAPTER X.

LIABILITY OF GOVERNMENT FOR ACTS OF ITS OFFICERS.

81. **State and federal governments.**—While sovereignty cannot be sued except by its own consent, the United States has made provision for being sued through the Court of Claims, and several states have followed its example. The Tucker Act of March 3, 1887, provides that the Court of Claims shall have jurisdiction over “all claims founded upon the Constitution of the United States or any law of Congress except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages liquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.” And in *Dooley v. United States*,⁶¹ this act was held to give the Circuit Court, sitting as a court of claims, jurisdiction in a case brought for the recovery of duties improperly collected by custom-house officials. In reversing the Circuit Court on the question of jurisdiction the Supreme Court says: “In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to

⁶¹ 182 U. S. 222.

the collector was a seizure and sale of the merchandise for the non-payment of duties; and it mattered not that at common law he had an action against the collector to recover them back. But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker Act of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker Act, has been repeatedly sustained."

But it must be remembered that this right exists by virtue of the statute, and that in the *Floyd Acceptances*⁶² the Supreme Court refused to hold the United States bound by the acceptance of bills of exchange by John B. Floyd, Secretary of War, and purchased by the plaintiffs before maturity and for a valuable consideration. The same rule applies to the states. A most interesting case illustrating the rule, and one which seems like a very harsh application of it, is that of *Lewis v. State of New York*.⁶³ This is a case in which the plaintiff brings suit for damages resulting from injuries received while a convict in the state penitentiary. The injury was due to his being compelled by the overseer to carry molten iron in a defective ladle, to

⁶² 7 Wall. 666 (U. S.).

⁶³ 96 N. Y. 71.

which defect he had called the attention of the overseer. In justifying its decision in favor of the state, the Court of Appeals says: "It is now contended by the learned counsel for the appellant that the act of the overseer in compelling the claimant to use the defective ladle, after having been notified of its unsafe condition, was an act of the state and of gross and inexcusable negligence. It is apparent that even if this is so, the claimant must fail unless the doctrine of *respondeat superior* can be applied to the state, and the state made liable for the negligence or misfeasance of its agent, in like manner as a natural person is responsible for the acts of his servants. We are aware of no principle of law, nor of any adjudged case, which makes that application, except when the state, by its legislature, has voluntarily assumed it."

82. Liability of municipalities and quasi-corporate bodies.—The doctrine of non-suability except by consent does not hold with regard to municipal corporations, as one of the objects in creating them corporations is to enable them to sue and be sued, yet while it is now generally held that quasi-corporate bodies, as counties, may be sued without legislative consent, it has not always been so held. In *Russell v. Men of Devon*,⁶⁴ it was held that the action was not maintainable, as the Men of Devon were not a corporate body, and even in the United States a similar view was held. In *Hamilton County v. Mighels*,⁶⁵ which was an action for damages caused

⁶⁴ 2 Term. Reps. 667 (Eng.).

⁶⁵ 7 Ohio St. 109.

by the negligence of county commissioners, it was held that the action could not be maintained because there was no statute authorizing it. The reverse of this is now the general rule, and counties as well as cities are suable. That they are liable on their contracts and suable for the enforcement thereof admits of no doubt, provided their officials had authority to make such contracts.

But whether or not they are liable in tort depends upon the character of service in which the tort occurred. If the act is one which is being performed by the city or county in its capacity as sovereign, rather than in its capacity as a mere property-owner, it is not liable. Thus, in *Askew v. Hale County*,⁶⁶ which was an action brought for injuries due to the negligence of county officials in repairing a bridge, the court held that the county was not liable, because the county was an involuntary political unit for aiding the state in the administration of governmental business, and that as such political subdivision of the state it shared the immunity of the state. A like decision was reached in the case of *Lorillard v. Town of Monroe*.⁶⁷ We quote the following very clear discussion of the subject from *Eastman v. Meredith*,⁶⁸ which is a case where the plaintiff sues for injuries caused by the collapse of a negligently constructed floor of a town-house while the plaintiff, a voter, was attending a town meeting. After discussing several cases in which

⁶⁶ 54 Ala. 639.

⁶⁷ 11 N. Y. 392.

⁶⁸ 36 N. H. 284.

towns have been held liable as owners and managers of property held for profit or in the exercise of a special power, the court says:

“The case of the plaintiff can not be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding the annual town meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such quasi-corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the state and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarily accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the state, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and state.”

In *Buttrick v. Lowell*,⁶⁹ the court refused to hold the city liable for damages caused by two policemen who assaulted and battered the plaintiff under circumstances which would not warrant any arrest. The court justified its decision on the ground that—

⁶⁹ 1 Allen 172 (Mass.).

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties, with which police officers and constables are intrusted, are derived from the law and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable.

"Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city."

83. Non-liability for acts of health officers.—In *Gilboy v. Detroit*,⁷⁰ the city was sued for damages due to the negligence of its board of health in allowing one infected with smallpox to go at large. The plaintiff was the proprietor of a boarding-house to which the infected person came and there became ill with smallpox, thereby causing great damage to the plaintiff's business. But the court held that the

⁷⁰ 115 Mich. 121.

universal rule is that such boards and officers are not acting for private but for public purposes; they represent the entire state through the municipality, and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards. A like conclusion as to non-liability of the city was reached in *Maximilian v. Mayor*,⁷¹ which was an action for injuries caused by the negligence of the driver of an ambulance employed by the commissioners of public charities, who in turn were appointed by the mayor. This proposition is well established.

84. Non-liability for acts of fire officials.—The same principle as is applied to police and health officials holds in regard to fire officials. Therefore in the case of *Hayes v. Oshkosh*,⁷² involving the question of the liability of the city for the loss of property set on fire by the negligent operation of a fire engine operated by the city fire department, it was held that the city was not liable. A like conclusion was reached in the case of *Wilcox v. Chicago*,⁷³ where damage was done to the plaintiff's carriage by the negligent driving of the wagon of a hook and ladder company. The same rule would apply to the blowing up of a building by dynamite where it was erroneously judged to be necessary in order to prevent the spread of a conflagration. Also the city was held not liable for the failure of the fire chief to order this done in a case where it would have prevented the spread of

⁷¹ 62 N. Y. 160.

⁷² 33 Wis. 314.

⁷³ 107 Ill. 334.

a conflagration, or to provide sufficient water with which to fight the fire.⁷⁴

85. **Apparent conflict in authorities.**—But the above principle is not applied with entire consistency, for we find that in *Missano v. Mayor*,⁷⁵ which was an action brought to recover damages for the death of a child run over and killed by a horse attached to an ash cart of the street cleaning department, and negligently driven by an employee of that department, the court of appeals held the City of New York liable. The care of the streets is placed by the court in the category of functions which the city performs in its private or proprietary and not in its governmental or public capacity. But to the lay mind this function seems to be very closely allied to, if not a part of, the duty of the city to preserve the health of its citizens. But the court takes the opposite view, as will be seen from the following extract from its opinion:

“It is clear upon principle and authority that the City of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual as distinguished from its governmental functions when it acts as a sovereign.”

But to our mind the reasoning in the dissenting opinion of Judge Gray is more convincing:

“Duties imposed upon municipalities for the benefit of all citizens, in the exercise of the sovereign power, and which are to be performed by independ-

⁷⁴ *Tainter v. Worcester*, 123 Mass. 311.

⁷⁵ 160 N. Y. 123.

ent officers, who may take their appointment from the corporation itself, through the nomination of its executive agents, make of the officers servants of the public at large. They are not, then, the agents or servants of the municipal corporation; but they are public officers, agents or servants of the general public, and the corporation is not responsible for their acts or omissions, or for those of their subordinates. In appointing the officer, in obedience to an act of the legislature, it does so in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community. This very explicit doctrine rests upon the basis of the distinction between the exercise by a municipality of powers which are delegated to it by the general government, to be exercised for the public welfare, and those which are conferred upon it for some especial benefit and advantage in its corporate capacity."

That the city is liable for negligence of its officers in the construction or repair of its pavements or sidewalks may be said to be settled by the decision of the Supreme Court of the United States in *Barnes v. District of Columbia*.⁷⁶ Yet this does not necessarily carry with it liability for the use of its streets by street-cleaning wagons any more than it does liability for their use by ambulances or fire engines. The question is of course one as to classification of functions with regard to their nature, and upon questions of this sort it is not surprising that there should be conflict in the point of view of those making the classification.

86. Liability under maritime law.—The admiralty courts will not, however, apply the rule of non-liabil-

⁷⁶ 91 U. S. 540.

ity which the state courts apply in the case of fire officials, but in a case where they have jurisdiction of the persons and subject-matter, they apply the rule of maritime law which holds the city liable for damages due to the negligent acts of its fire officials. Thus, in *Workman v. Mayor of New York*,⁷⁷ where the barkentine *Linda Park*, which was the property of the libellant, was injured by the steam fireboat *New Yorker* while moored to the dock at pier 48 in East River, the Supreme Court of the United States reversed the decision of the Circuit Court of Appeals holding the city not liable. The facts in the case established the negligence of the fireboat. In refusing to apply the rule of the court of the state of New York with respect to the liability of the city for the negligence of its officials, the court, speaking through Justice White, says:

“The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions,

⁷⁷ 179 U. S. 552.

that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

“The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion resulting would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the

patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state."

CHAPTER XI.

CONTROL OF COURTS OVER PUBLIC OFFICERS.

87. Power to nullify acts of legislatures.—Though the courts will not enjoin the passing of a statute or ordinance, they will, if it is beyond the power of the legislative body to pass such a law, nullify it by declaring it unconstitutional. The exercise of this power by the courts is very familiar and it is needless to attempt an exhaustive list of examples of its exercise. The classic case is that of *Marbury v. Madison*,⁷⁸ which is a case of the exercise of its power by the Supreme Court to nullify an act of Congress. In *City of Clinton v. Phillips*,⁷⁹ the Supreme Court of Illinois set aside an ordinance of the city of Clinton requiring druggists to make quarterly reports of their sales of spirituous liquors, giving the kinds and quantities sold and to whom sold. It was declared unconstitutional as “it is an invasion of the sanctity of private business, and ought not to be tolerated.”

Also the Supreme Court of California, in the *Matter of Ah You*,⁸⁰ set aside an ordinance of the city of San Francisco imposing a maximum fine of \$1,000 or six months' imprisonment, or both, for visiting a house of ill-fame. The reasonableness of the ordinance was brought before the court on a petition for

⁷⁸ 1 Cranch 137 (U. S.).

⁷⁹ 58 Ill. 102.

⁸⁰ 88 Cal. 99.

a writ of habeas corpus. The court says: "The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy. We are of the opinion that so much of the ordinance in question as permits a fine of one thousand dollars to be imposed as the penalty for visiting a house of ill-fame is unreasonable, and not in harmony with the laws of the state, and therefore void. The petitioner must therefore be discharged from custody."

88. **Courts will not enjoin passing of an ordinance.**—The court will not, as stated, enjoin the passing of an ordinance; for the mere act of passing an ordinance does not render the danger to anyone sufficiently imminent to warrant the intervention of the court, as the passage of an ordinance does not necessarily mean its enforcement. Until there is an attempt to enforce the will of the legislative body, life, liberty, or property are not placed in sufficient danger to call for the intervention of any extraordinary remedy. The legislative branch may furnish the remedy by repealing the law, or the executive branch by doing nothing, either of which is simpler than the remedy of the court. As said by the court in *Harrison et al. v. City of New Orleans*:⁸¹ "The

⁸¹ 33 La. Ann. 222.

mere voting on or passing the ordinance in question cannot per se do the plaintiff any possible injury. It will be time enough to complain, if it be a subject for complaint, when steps are taken or a beginning made to put the ordinance into actual execution."

89. Courts slow to enjoin collection of a tax.—

The courts are also slow to enjoin the collection of a tax and will not do so unless there are circumstances which bring it within equity jurisdiction. They recognize the fact that the state must have revenue in order to perform the functions of government, and will not, except in an extreme case, throw impediments in the way of its collection. As said by the Supreme Court of the United States in *Dows v. Chicago*: "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complain-

ant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived." But if convinced that the tax is not for a public purpose, the courts will, at the suit of a taxpayer, enjoin its collection or the issue of bonds to be paid out of the proceeds of taxation.⁸² If the bonds have been already issued, courts will refuse to recognize their validity in a suit to enforce payment, or payment of the interest on them.⁸³ To do this, it is of course necessary for them to declare unconstitutional the act providing for the taxation, and this they will do. They will also declare unconstitutional an act providing for a tax if for any other reason the legislature enacting it did not have the constitutional power to levy such a tax. This was decided by the Supreme Court of the United States in the classic case of *McCulloch v. Maryland*⁸⁴ practically a century ago and since then the power of the courts, both state and federal, to exercise such power has been admitted. The most notable recent exercise of the power was the enjoining of the Farmers' Loan & Trust Co. from paying certain taxes levied under what is known as the Income Tax Law of 1894, on the ground that said law was unconstitutional in so far as it attempted to levy a direct tax without regard to the provision of the Constitution requiring the apportionment of direct

⁸² *Lowell v. City of Boston*, 111 Mass. 454.

⁸³ *Loan Association v. Topeka*, 20 Wall. 655 (U. S.).

⁸⁴ 4 Wheat. 316 (U. S.).

taxes in proportion to the population of the states.⁸⁵ It was held that taxes which are levied on the income of real estate and of personal property are direct taxes.

90. Control of officers by certiorari.—Where officers are empowered to proceed in a summary way or in a mode unknown to the common law, and no other method of revision is specially provided, certiorari will lie.⁸⁶ It will issue to review the appointment and proceedings of commissioners to value land taken for corporate purposes and to appraise damages by special statutory authority; the laying out of a road under an act incorporating a turnpike company;⁸⁷ the acts of commissioners who have passed upon the question of damages to an abutting owner by a change in the grade of a street but have failed to report in his favor.⁸⁸ It will also lie “in proceedings of a summary character by bodies exercising quasi-judicial functions which do not admit of any other remedy for a direct review, clear violations of law in doing those things which are within the jurisdiction of the body to do in a legal manner.”⁸⁹ It will issue to review the actions of inferior tribunals in proceedings against insolvents or fraudulent debtors.⁹⁰ But as a means of reviewing the proceedings of an inferior tribunal, the statutes of most states have now provided for substituting for it an appeal.

⁸⁵ *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601.

⁸⁶ *Campbell v. Strong*, Fed. Cas. No. 2367b; but see *State of Georgia v. Stanton*, 6 Wall. 50 (U. S.), LEADING ILLUSTRATIVE CASES.

⁸⁷ *State v. Newark & Pompton Turnpike Co.*, 2 N. J. L. 318.

⁸⁸ *Stewart v. Hoboken*, 57 N. J. L. 330.

⁸⁹ *State v. Lawler*, 103 Wis. 460.

⁹⁰ *People v. Daly*, 67 Barb. 325 (N. Y.).

91. **By habeas corpus.**—Where a public officer has the custody of a person by any other authority than the order or sentence of a court having jurisdiction, the right of such officer may be looked into by means of a writ of habeas corpus commanding him to bring the prisoner into the court issuing the writ and show by what authority the prisoner is detained, and if this showing is not satisfactory, he is ordered to release the prisoner. This is a compulsory, not a discretionary, writ. By the fourteenth section of the Judiciary Act of September 24, 1789, it is provided “that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial by some court of the same, or are necessary to be brought into court to testify.”

In accordance with this, the federal courts do not interfere with the jurisdiction of the state courts, and the reverse is also true. If, however, a state officer has custody of a prisoner whom the federal and not the state courts have jurisdiction to try, the federal court having jurisdiction will issue a writ of habeas corpus commanding the said state officer to bring the prisoner into the court issuing the writ, and may enforce obedience.⁹¹ In the case just cited

⁹¹ In re Neagle, 135 U. S. 1; also see In re Sawyer, 124 U. S. 200, **LEADING ILLUSTRATIVE CASES.**

will be found a review of the amendments of 1833, '42, and '67 to the Judiciary Act of 1789 with regard to the power of the federal court to issue the writ and the causes which led to said amendments. In *Abelman v. Booth*,⁹² the Supreme Court of the United States reversed the decision of the Supreme Court of Wisconsin, holding that one of its judges might by writ of habeas corpus annul the proceedings of a Commissioner of the United States and discharge a prisoner committed by him for an offense against the laws of the United States, and in *United States v. Booth*, argued with the above, reversed a decision of the same court holding that it might discharge a prisoner by habeas corpus proceedings who had been found guilty and sentenced by a United States District Court. The Supreme Court of the United States, through Chief Justice Taney, says:

“We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the state; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead. But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any

⁹² 21 How. 506 (U. S.).

defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court. And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by habeas corpus or any other process."

92. Control of officers by mandamus.—As we have already had occasion to notice, the court will by mandamus compel the performance of ministerial duties by public officers. Mandamus will not, however, be issued to compel the performance of an unlawful act,⁹³ or an act which has become impossible of performance,⁹⁴ or to compel the performance of an act forbidden by an injunction of a court of the same state.⁹⁵ It will issue out of a federal court to compel the performance of an act notwithstanding the fact that it has been forbidden by an injunction issued by a state court.⁹⁶ As said by the Supreme Court of the United States in the case last cited: "Viewed in any light, therefore, it is obvious that an injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a circuit court, because in their sphere of action the circuit courts are wholly independent of the state tribunals." In this case a mandamus was issued commanding the

⁹³ *People v. Fowler*, 55 N. Y. 252; also see *State ex rel. Carpenter v. Supervisors Town of Beloit*, 21 Wis. 282, LEADING ILLUSTRATIVE CASES.

⁹⁴ *County Comrs. v. Jacksonville*, 36 Fla. 196.

⁹⁵ *Ohio, etc., Ry. Co. v. Comrs.*, 7 Ohio St. 278.

⁹⁶ *Riggs v. Johnson County Commissioners*, 6 Wall. 166 (U. S.).

county commissioners to levy a tax notwithstanding the fact that they had been forbidden to do so by an injunction of the state court. Mandamus will issue to compel the proper officers to hold an election⁹⁷ or to compel the attendance of officers whose duty it is to act with a board in electing another officer.⁹⁸ To compel the performance of ministerial duties affecting the public, any taxpayer has sufficient interest to enable him to apply for the writ.⁹⁹ Though this is the general rule, there is some conflict.¹

Where the interest is merely private, the applicant must show some special interest not shared by all the other members of the community.² Where a writ of mandamus has been issued, a change in the personnel of the board to whom it is directed will not abate the writ.³ But it has been held by the same court that a writ issued to the head of a department would abate on his death or retirement from office, for the reason that having had no opportunity to be heard, the successor to the office, against whom no judgment had been issued, could not be adjudged in default.⁴

93. Control by prohibition.—The writ of prohibition is a discretionary writ for the purpose of preventing further proceedings by an inferior judicial

⁹⁷ *Atty. Gen. v. Com. Council*, 78 Mich. 545.

⁹⁸ *Wampler v. State*, 148 Ind. 557.

⁹⁹ *Union Pacific Ry. Co. v. Hall*, 91 U. S. 343; also see *Brown v. Russell*, 166 Mass. 14, LEADING ILLUSTRATIVE CASES.

¹ *Wellington et al., Petitioners*, 16 Pick. 87 (Mass.).

² *People v. Walker*, 9 Mich. 328.

³ *Commissioners v. Sellew*, 99 U. S. 624; *Thompson v. U. S.*, 103 U. S. 480; *Murphy v. Utter*, 186 U. S. 95.

⁴ *Secretary v. McGarrahan*, 9 Wall. 298 (U. S.); *U. S. v. Boutwell*, 17 Wall. 604 (U. S.).

or quasi-judicial tribunal. It lies not only where an inferior tribunal is proceeding to adjudicate a matter over which it has no jurisdiction, but also to prevent the exercise of unauthorized power in a case where the tribunal has jurisdiction over the subject-matter of the case.⁵ It is a proper remedy to prevent further proceeding by an inferior tribunal after an appeal has been taken to a higher court.⁶ It is within its limited sphere analogous to injunction in its much wider sphere.

The nature and purposes of the writ have been very clearly stated by Chief Justice Shaw in *Connecticut River Ry. Co. v. County Com'rs.*⁷ In this case the relator applied for a writ of prohibition to prevent the county commissioners from taking his land for a passenger station in accordance with a statute making no sufficient provision for paying the owners. His contention was that the statute was unconstitutional and hence conferred no jurisdiction on the commissioners. The Chief Justice says:

“A writ of prohibition, issuing from the highest court of common law, is the appropriate remedy to restrain a tribunal of peculiar, limited, or inferior jurisdiction from taking judicial cognizance of a case not within its jurisdiction. * * * The fact that the remedy by petition for a writ of certiorari will be open to the land-owner, after final judgment, affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the

⁵ *Appo. v. People*, 20 N. Y. 531; see also *State Railroad Tax Cases*, 92 U. S. 575, LEADING ILLUSTRATIVE CASES.

⁶ *Fite v. Black*, 85 Ga. 413.

⁷ 127 Mass. 50.

trouble, expense, and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings. * * * The fact that an agent of the commonwealth is the adverse party, in the proceedings before the county commissioners, affords no reason for refusing the writ. A writ of prohibition, like a writ of mandamus or of certiorari, is properly sued out in the name of the crown or the state; the only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled, or quashed; and there is no class of cases where the authority to issue writs of prohibition is better settled than in those of courts martial, ecclesiastical courts, or inferior courts of common law, assuming to take cognizance, in excess of their jurisdiction, of criminal prosecutions."

CHAPTER XII.

TERMINATION OF OFFICIAL RELATION.

94. **Expiration of term.**—The most natural and ordinary way for the official position of an officer to terminate is by the expiration of the term for which he was chosen. This term may be either for life, for a definite number of years, or until his successor shall have been duly elected and qualified. This latter proviso, in order to avoid an interregnum, is sometimes placed in the constitution or statutes and sometimes implied by the law.⁸ If, however, an officer seeks to avail himself of this proviso to hold longer than he is lawfully entitled to office, his right may be tested by quo warranto proceedings.

95. **Death.**—In the case of a single officer it is clear that his official relation is terminated by his death, but in the case of a board consisting of three or more members the death of members will not affect the status of those remaining, and, provided a majority remain, it will not affect their power to act.⁹ It is the policy of the law to guard against the failure of a public service, and where this end can be accomplished by majority action it is allowable.

96. **Abolition of office.**—As an office is neither a contract nor a property right, it may, if not protected by the constitution, be abolished by the legislature.

⁸ State v. Bulkeley, 61 Conn. 287.

⁹ People v. Palmer, 52 N. Y. 83.

Where this is done, the official relation of the officers is of course terminated. It was decided by the Supreme Court of the United States in *Butler v. Pennsylvania*¹⁰ that public offices do not come within the provision of the Constitution of the United States against the impairment of the obligation of contracts, and that the legislature might decrease the pay or abolish the office of canal commissioners, without subjecting the state to a suit for damages.

97. **Abandonment of office.**—Though the state may abolish the office and thus end the term of an officer, the right of the officer to bring the official relation to an end by abandoning his office—i. e., ceasing to perform the duties of it—is not so universally admitted. The state may, if it chooses, compel him by mandamus to continue until the end of his term to perform the duties of the office.¹¹ At any rate, a neglect of duty is generally considered merely a cause for removal and not ipso facto a termination of the relation. A persistent neglect of duty indicating an abandonment would be proper grounds for quo warranto proceedings where no other more convenient method of removal is provided.

98. **Loss of qualifications.**—Where residence within the district is one of the qualifications for holding office, a removal from the district for a considerable length of time will be a sufficient cause for removal from office, and if the change of residence is permanent it will create a vacancy.¹² Thus, where

¹⁰ 10 How. 402 (U. S.).

¹¹ *People v. Williams*, 145 Ill. 573.

¹² *Yonkey v. State*, 27 Ind. 236.

a county officer leaves the county with his family, with the intention not to return, or goes to another state with the intention of there making it his home, he is held to have vacated his office.¹³ Voluntarily enlisting in the military service of the United States will produce the same result.¹⁴ When a maximum age limit is provided, as for army officers, the statute may provide that the passing of this limit will operate automatically to create a vacancy or merely make it a sufficient cause for retirement, as in the case of justices of the Supreme Court of the United States. Where a public officer becomes insane, this does not, apart from statutory provision, render the office vacant, but is of course sufficient cause for removal, just as it would, if known in advance of his taking the office, have been sufficient to disqualify him. This is in accord with what has been called the "common political law."¹⁵ In case of officers removable only by impeachment, where the only grounds of impeachment are "high crimes and misdemeanors," the question of the removal because of the officer's becoming insane is a very interesting one. The question arose in the case of Justice Pickering, but, before action was taken, he died. Where the appointing power has also the power of removal, the question is a simple one, as insanity is recognized as sufficient cause for removal.

99. Removal at will.—The power to appoint does not necessarily carry with it the power to remove.

¹³ Mechem, *Public Officers*, § 439.

¹⁴ *State v. Allen*, 21 Ind. 517.

¹⁵ *Cushing's Leg. Assemblies*, § 56.

This is of course the case where other provision is made for removal, as in the case of federal judges, who are appointed by the President, but may be removed only by impeachment. It is true also of officers appointed for a fixed term. But where the nature of the service is advisory, as a member of a cabinet, or confidential, as a private secretary, the office is generally considered as one to be held at the discretion of the appointing power, and he may remove without assigning any cause for so doing. Thus, in the *Matter of Hennen*,¹⁶ the Supreme Court of the United States sustained the removal of a clerk by a circuit judge, notwithstanding the fact that the judge stated "unreservedly that the business of the office had been conducted promptly and uprightly and that in appointing Mr. Winthrop to succeed him, he had been actuated purely by feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted. And that, as his capacity to fill the office cannot be questioned, he felt that he was not exercising any unjust preference, in bestowing on him the appointment."

100. Removal for cause.—At common law, an officer was removable for cause only and was entitled to a hearing.¹⁷ Also there are decisions in this country holding that, in the absence of statutory provisions, the common law rule applies to an officer of a municipal corporation.¹⁸ Where the constitution

¹⁶ 13 Pet. 230 (U. S.).

¹⁷ *Baggs Case*, 11 Coke 93b (Eng.); *Rex v. Coventry*, 1 Lord Ray. 391 (Eng.).

¹⁸ *State v. Common Council*, 9 Wis. 229.

confers upon the appointing power the authority to remove at will officers whose term is not fixed by law, this is held by implication to make removable for cause only those whose term is fixed by law.¹⁹ And where a statute requires that officers appointed for a fixed term can be removed for cause only, it cannot be evaded by a failure to fix the term, whether the failure be due to design or negligence, and a removal under these circumstances, except for cause, is void.²⁰ Where the term is during good behavior, the officer cannot, even though he misbehave, be removed without notice and hearing.²¹ Where "notice" is provided for in the statute, it implies an opportunity to be heard and the taking of testimony, but "explanation" does not.²²

101. **Sufficiency of cause.**—Where the statute provides that an officer is removable for cause only, without specifying any particular act or omission, it has been held that the cause "is to be some dereliction or neglect of duty, or incapacity to perform the duties, or some delinquency affecting his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place."²³ The determination of the question of sufficiency of cause is in its nature judicial, but it is not unusual for the constitution or statutes to provide for its determination by the executive.²⁴ So though the proceeding

¹⁹ *People v. Jewett*, 6 Cal. 291.

²⁰ *State v. Police Com'rs.*, 88 Mo. 144.

²¹ *Page v. Hardin*, 8 B. Monroe 648 (Ky.).

²² *People v. Thompson*, 94 N. Y. 451; also see *Dullam v. Willson*, 53 Mich. 392, **LEADING ILLUSTRATIVE CASES.**

²³ *People v. Fire Com'rs.*, 72 N. Y. 445.

²⁴ *Mechem, Public Officers*, § 457.

is judicial in its nature and reviewable by certiorari, a statute vesting in the governor the determination of the question whether cause exists for the removal of county officers is not unconstitutional as conferring judicial functions upon an executive officer, since the power of removal is also political in its nature.²⁵ Where certain causes are enumerated, this impliedly excludes the removal for other causes, and if an officer is removed without the notice and hearing required in case of the enumerated causes, it will be presumed that he was removed for other causes.²⁶

102. **Suspension.**—Although the power of removal and the power to suspend are intimately related, the former does not necessarily include the latter.²⁷ The reason for this is that when an officer is removed a vacancy is created, the filling of which may be compelled by mandamus, but this is not true of a suspension, which might thus be used for the purpose of preventing the performance of the duties of the office and so defeating the aim of the people or legislature in creating the office. As said by the Supreme Court of New Jersey in the case of *State v. Jersey City*:²⁸ "Suspension from the duties of the office creates no vacancy; the seat is filled but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel, not to suspend."

A like conclusion was reached by the Court of Appeals of New York in the case of the suspension

²⁵ *People v. Stuart*, 74 Mich. 411.

²⁶ *Shurtleff v. United States*, 189 U. S. 811.

²⁷ *Metaker v. Neally*, 41 Kan. 122.

²⁸ 25 N. J. L. 536.

of an officer by a board authorized to remove him. Justice Peckham, delivering the opinion of the court, said: "There is nothing in the nature of the power to remove or expel which necessarily and in all cases would include a power to suspend; for in some instances the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. Whether the power to remove includes the power to suspend must depend, among other things, upon the question whether the suspension, in the particular case, would be the exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence would be indulged in, based only on the grant of the specific power to remove."²⁹ There are decisions which conflict with this view,³⁰ and the Supreme Court of New Hampshire, in *Shannon v. Portsmouth*,³¹ says, with a degree of positiveness bordering upon dogmatism, that "it does not seem to require any argument to show that the power to remove must include the power to suspend." But the rule laid down by the New Jersey and New York courts in the cases just cited is in accord with the weight of authority in this country.

103. Impeachment.—Removal by impeachment is provided for in the Constitution of the United States and the constitutions of the various states. Article I,

²⁹ *Gregory v. Mayor*, 113 N. Y. 416.

³⁰ *State v. Lingo*, 26 Mo. 496.

³¹ 54 N. H. 183.

§ 2, chapter 5, of the former vests in the House of Representatives "the sole power of impeachment," and in the Senate "the sole power to try all impeachments," and when sitting for this purpose the Senate "shall be on oath or affirmation"; that when the President of the United States is tried, the Chief Justice shall preside; that the concurrence of two-thirds of the members present shall be necessary to a conviction; and in § 3, chapter 6, that judgment "shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit, under the United States." If we substitute the word "governor" for "President," we find almost identical provisions in the state constitutions, except that in New York and some other states the judges of the Court of Appeals sit with the senators as a court for the trial of impeachments. When the governor is being tried, the lieutenant-governor, being an interested party, is not allowed to sit in the court. After articles of impeachment have been filed against a judicial officer, he is not allowed to exercise his office until he shall have been acquitted. The case of Andrew Johnson is the only attempt to remove a President of the United States by impeachment, and it is fortunate that in this case a sense of duty and respect for law triumphed over intense partisanship. As a means for removing judges, impeachment has been pronounced by many a dead letter, but it was very effective in the case of Judge Archbald of the Commerce Court.

104. **Recall.**—The method of removing public officers by a popular referendum denominated the recall

has already been considered as applied to judges; and most of the reasons there urged in opposition to it hold as regards other than judicial officers, though not with the same force.

105. **Resignation.**—The resignation of a public officer may be either express or implied. When the former it may be either oral or written, and need not be under seal even though the statute requires the appointment to be under seal.³² When the resignation is by implication, as in the case of accepting an incompatible office, or where residence is necessary, a permanent change of residence, the right to the office may be regarded as forfeited; and the acceptance of the resignation may also be by implication, as by regarding the office vacant and appointing or electing another to the office.³³ In order to warrant an implication of resignation from non-user, it must be total and complete:³⁴ “Non-user may be so greatly prolonged, especially where it is accompanied with other acts, as to indicate conclusively an abandonment of the office; and in that case no removal or judicial declaration is necessary.”³⁵

106. **Acceptance of resignation.**—Whether the resignation is express or implied, the common law rule is that it must be accepted by the appointing power in order to sever the official relation;³⁶ but as stated above, the acceptance may be either express or

³² *Gilbert v. Luce*, 11 Barb. 91 (N. Y.).

³³ *Phillips v. Boston*, 150 Mass. 491.

³⁴ *People v. Green*, 5 Daly 254 (N. Y.); *Page v. Hardin*, 8 B. Monroe 648 (Ky.).

³⁵ *Throop*, Public Officers, § 422.

³⁶ *Regina v. Lane*, 2 Ld. Ray. 1304 (Eng.).

by the appointment of another to the office. The American cases are conflicting. In *United States v. Wright*,⁸⁷ Justice McLean laid down the doctrine that a public officer may resign at pleasure, without the consent of the appointing power. In his opinion in the above case, which was an action in the circuit court on the official bond of a collector of internal revenue in which the defense was that the breach occurred after the collector had presented his resignation, the Justice said: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation be received to take effect, and this does not depend upon the acceptance or rejection of the resignation by the President. And if Fogg had resigned absolutely and unconditionally, I should have no doubt that the defendant could not be held subsequently as his surety." This doctrine has been followed by the courts of New York, Indiana, Iowa, California, Nevada, Virginia, and Nebraska. But the courts of the other states refuse to follow this doctrine, and it has been overruled by the United States Supreme Court in the case of *Edwards v. United States*.⁸⁸ After reviewing the English decisions, Justice Bradley, delivering the opinion of the court in this case, says: "In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices and, in some states,

⁸⁷ 1 McL. 509 (U. S.).

⁸⁸ 103 U. S. 471.

with regard to offices in general, may have obtained; but we must assume that the common law rule prevails unless the contrary be shown." Which view will be taken, depends of course upon the view taken of the obligation to accept a public office. Those who answer this in the affirmative are of course driven to the conclusion that a resignation does not sever the official relation until accepted by the proper authority for it would be a travesty upon logic to say that one may be compelled by mandamus to accept an office, if the officer may immediately thereafter tender his resignation and by so doing render the office vacant.

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PARLIAMENTARY LAW

BY

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CHAPTER I.

INTRODUCTION.

1. **Preliminary statement.**—Parliamentary law may be divided into two parts, the equivalents of common and statutory law.

Common parliamentary law, in its origin, was founded upon the practice of the English Parliament but has little at present, except its name, to suggest that origin.

Before Jefferson, early in the last century, wrote his manual, American parliamentary law was principally a collection of English precedents, which were admired because they were precedents and not because they were admirable. Parliamentary law cannot yet be said to be perfected, but it has acquired a practical efficiency beyond which little is to be desired or expected. Of course many questions still arise about which authorities seem to differ and the practice to vary. These, however, are, in the main, non-essential, and this lack of petrification is characteristic of living, as distinguished from dead, systems in all fields of learning.

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Most deliberative bodies, exercising thereby an inherent right, enact a few special rules for their own guidance. These rules modify or add to the common parliamentary practice of the text books and thus correspond with the statutory division of municipal law. Some of these special rules are of frequent occurrence and will be referred to hereafter. An original treatment of the subject is no longer possible and would not be useful if attempted. This article is, accordingly, much indebted to the standard manuals. (See Bibliography at end of this article.)

2. Organization of assemblies—Members.—Inasmuch as the law of debate presupposes a lawful debater, a brief consideration of the organization and membership of assemblies stands at the threshold of parliamentary law.

Assemblies differ not only in their character as voluntary and prescribed by law, but also in the nature of the right of membership. Some require an elaborate, others the simplest, organization.

An assembly may be a voluntary one called together by interested parties, and of such anyone who is invited will be a member. Political mass meetings are of this class. Again, an assembly may be prescribed by law, and those only can be members who are chosen in accordance with that law, or who, by virtue of credentials regular on their face, appear to have been so chosen. Legislatures are examples of this class. Other assemblies are constituted pursuant to a call by competent authority in such a way that each member, though chosen by a

voluntary body, must present evidence of such choice. Political nominating conventions are of this description.

It is evident that these different kinds of assemblies require different kinds of organization. Those the membership of which cannot be in dispute organize at once and need but a simple system. Those the membership of which might be in dispute cannot fully organize until the preliminary question of membership is settled. In legislative bodies some officer, specified by law, makes up a roll which is regarded as conclusive for the time being, and those named thereon having been called to order by him or by some other specified person, proceed to permanent organization. Until the presiding officer is chosen this person presides. In such assemblies as nominating conventions, the right to sit in which is attested by credentials, a temporary organization is first had, the credentials are immediately examined by a committee whose report is submitted to the assembly and passed upon, and the permanent organization follows. All kinds of deliberative assemblies, however, have and exercise the right, should any question arise, to pass finally upon the qualifications of their own members. When a question arises involving the right of a member to his seat he is entitled to be heard on the matter, but should withdraw before a vote is taken.

3. **Officers.**—The usual and necessary officers of an assembly are a presiding and a recording officer, both of whom are chosen by the assembly itself except in the case of presidents of senates. The

president of a state senate is usually the lieutenant governor *ex-officio*. The president of the United States senate is similarly the national vice-president. The presiding officer of a house of representatives is called the speaker, in other bodies he is called the president, and the recording officer the secretary, although these officers are sometimes designated, respectively, chairman and clerk. The presiding officer of a religious assembly is usually addressed as moderator, and the recording officer as scribe. A vice-president or a president *pro tempore*, if appointed and present, should preside whenever the president vacates the chair. The secretary of state generally calls a new state senate to order and presides until the lieutenant governor is sworn in or a president *pro tempore* elected. Houses of representatives are first presided over by the speaker of the preceding house. The chairman of the state central committee calls the state convention of his party to order and frequently designates the temporary chairman. Town meetings are called to order by the first selectman and then proceed to elect a chairman. Voluntary assemblies may well be called to order by the person or one of the persons upon whose invitation they meet.

In selecting a chairman for any meeting all necessary or desired nominations for officers should first be made. The person calling the meeting to order should then rehearse the list of nominees and put the vote upon each in the order in which they were nominated. A presiding officer can never be properly chosen by a mere plurality of votes even in those states in which state officers are so elected,

unless the assembly, by a majority vote, has previously so ordered. He should be chosen by, or in accordance with the direction of, a clear majority of the body in which he is to officiate, for otherwise he might, by a majority vote, be removed as soon as seated.

4. **Control of meeting place.**—The place where an assembly is held being in its possession, no person is entitled to be present there except by its consent, and if any person refuse to withdraw or conduct himself improperly the assembly may, unquestionably, employ sufficient force to remove him. It may keep its own members in as well as strangers out, both of which rights are frequently exercised.

5. **Special rules of procedure.**—After organization rules of procedure should be adopted if any departure from common parliamentary practice is desired. When thus adopted these rules will, pro tanto, supersede the common law. To avoid all disputes as to what the common parliamentary law is it is prudent for the assembly to specify the textbook which shall declare it. A difference of opinion exists as to whether rules once adopted can be modified in any other way than that prescribed in the rules themselves. The weight of authority holds that they cannot.

6. **Quorum.**—The “quorum” of an assembly is that number which must be present to make the assembly a body competent to transact business. There is no rule applicable to all cases. Assemblies which are not representative or judicial and where all are principals, do not require a quorum. Town

meetings in New England, stockholders' meetings, and voluntary gatherings generally are of this class.

Where a body is a representative one performing the functions of government for a constituency, or a financial one managing the business of the corporation which selected it, the quorum is a majority. Legislatures, city councils, and boards of directors are of this class. Where the body is appointed to perform a single act which requires the exercise of judgment, the whole board constitutes the quorum. All must be present and deliberate, although the majority is competent to act. Referees are of this class. In most public bodies the number necessary to make a quorum is fixed by law. In voluntary bodies it may be fixed by the body itself. The quorum required to render an assembly competent to transact business is a present quorum and not a voting quorum. If the number necessary to make a quorum is actually present, it makes no difference how many or how few participate in a decision. Those who sit silent are regarded as consenting to the result.

In strictness, a chairman ought not to take the chair until after the appearance of a quorum, but in practice he generally does and, until the question is raised, a quorum is always assumed to be present, even when neither the voting or the appearance of the assembly indicates it. If, when the question is raised, a count of the house discloses the absence of a quorum, the assembly must adjourn, unless it remains in session to persuade, or (if given that right by law) to compel, the attendance of absent members. If it adjourn, it may fix the time to which

to adjourn, but not beyond the next sitting day. For legislative bodies these matters are generally regulated by constitutional provisions. If a quorum be present, a majority of that quorum may transact business. Accordingly, in a common council of twelve members when seven are present, four, a mere majority of that number, may pass votes which bind the whole council.

7. Order of business.—The order in which business shall be conducted is usually prescribed by a rule of the assembly and, when prescribed, should be followed. In meetings held pursuant to an invitation or under a formal call, for which special rules are seldom adopted, the order of business should follow the specifications of the call in so far as that is practicable.

8. Determinations—How arrived at.—Determinations are arrived at by the majority of votes. Unless there be some binding regulation to the contrary, a proposition is carried by a majority of the votes cast (a quorum being presumed to be present), for the right of the assembly to arrive at conclusions is not impaired by the mere silence and inaction of some of the voters in the room. The majority principle, however, may be modified by a special rule or binding law, under which a less number than a majority is admitted, or a greater number required, to define the will of the assembly with reference to some particular subject. Thus, it is generally provided in legislative assemblies that one-fourth or one-fifth of the members present may require the taking of a vote by yeas and nays and,

on the other hand, that no alteration in the rules shall be made except by a two-thirds vote.

9. Presiding officer—Conduct and rights.—Where but one presiding officer is originally appointed and for any reason a substitute for the time being becomes necessary, the proceedings leading up to his choice should be conducted by the recording officer. The presiding officer, however, when leaving the chair temporarily, may always call some member to take his place. This appointment is vacated by the next adjournment (unless the presiding officer sooner resumes the chair) and is always subject to the will of the house. The presiding officer should rise when addressing the assembly, or stating a motion, or putting the question. He may read a communication or recognize a member when seated. Where the presiding officer is a member of the assembly, his right to participate in its actions and debates admits of no question. That he should not do so, save upon rare and extraordinary occasions, is equally certain. Except in the case of an appeal from his ruling, he should never debate from the chair, and he is expected to vote only in certain contingencies, to be hereafter explained.

10. The clerk.—If but one clerk is chosen and he is at any time absent, his place should at once be filled. The clerk should be a good reader, with considerable knowledge of parliamentary law, and the ability to express himself concisely and accurately in writing.

11. The journal.—The journal in legislative bodies should contain what is “done and past,” but

not what is said or what is merely proposed or moved without coming to a vote. In some other bodies, as, for instance, religious or political assemblies, what was said may be as important as what was done. In such cases the minutes are properly much more extensive and may become practically a report of the entire proceedings.

12. **Members—Their rights and duties.**—The rights and duties of members are easy to state but difficult to enforce. The rights of each member are based upon the doctrine of his equality with every other member. He has, therefore, the right to present his propositions and to debate them according to the rules. Each member has the right to insist that the assembly be in order and may rise to demand the same, but in so doing must not increase the disorder.

The duties of each member arise from his being a component part of an assembly which desires to act together, and in order to act together, must come to some agreement. The member must maintain order and refrain from conversation. He should not engage in other business than that before the meeting, or pass between the member who has the floor and the presiding officer, or interrupt a member who is in order except with his consent. He should not use discourteous expressions, or employ even proper parliamentary motions to create discord or to impede, unreasonably, the common action.

13. **Disorderly conduct.**—In all instances of disorderly deportment, it is competent for every member, and is the special duty of the presiding officer,

to call attention to the offense. When this is done by the presiding officer he is said to "name" the offender. The member thus complained of is entitled to be heard in his own defense, but must then withdraw unless given permission to remain. The assembly thereupon determines the punishment, which may consist either of a reprimand, a prohibition from speaking or voting for a specified time, or expulsion. As an alternative to expulsion, a disorderly member is sometimes required to apologize. The disorderly conduct above referred to does not include such offenses as the use of wrong motions or a mistaken sequence of procedure, which will be considered hereafter.

CHAPTER II.

THE INTRODUCTION OF BUSINESS.

14. **Preliminary statement.**—The will of an assembly is evidenced by the agreement of the greater number of those voting, and the first step to that end is the submission of a proposition or motion which will form a basis for the further proceedings of the assembly, this proposition to be assented to, rejected, or modified, according as it expresses or not, or may be made to express, the sense of a majority of the members. The different proceedings which take place from the first submission of a motion through all the changes it may undergo until the final decision of the body upon it, constitute the subject matter of that division of parliamentary law which governs debates.

There are, of course, different forms in which different kinds of actions are put. When an assembly commands, it is by an order. If it desires to express its opinion or purpose or make a statement of facts, a resolution is the usual method. If a legislative body, it enacts public laws by means of a bill which, when approved by all those entitled to deal with it, becomes an act. Bills, not public in their nature, are sometimes called resolutions.

15. **Business, how begun.**—The beginning of business in either of the forms above referred to is its introduction by a member from the floor. Only

members on the floor have a right, ordinarily, to present business to the assembly. The presiding officer, it is true, may lay before the assembly certain kinds of business, but this is always by virtue of some special rule. The presiding officer is under no obligation to present any communication sent to him by persons outside the body over which he presides. The only way in which a person, not a member, can reach the assembly is through a member.

If the proceedings of a deliberative assembly were confined to the making of propositions by the individual members and their acceptance or rejection by the votes of the assembly, parliamentary law would be indeed simple. But this is not the case. Members are not limited to giving an affirmative or negative to such questions as may be proposed. They may be unwilling to act upon them at all, they may desire to postpone their consideration to a future time, they may be willing to adopt them with certain modifications, or they may prefer to have them first considered in committee. These are but a few of the many preliminary or collateral steps which may be taken, and motions adapted to each have been invented, thus establishing numerous and intricate rules which effectually deprive parliamentary law of the right to be called simple.

16. The "floor"—How obtained.—Whenever a member desires to introduce business he rises in his place and addresses the presiding officer by whatever his title in that particular assembly may be. The chair thereupon recognizes the member and says: "Mr. A has the floor," or simply "Mr. A."

In legislative assemblies the presiding officer recognizes the member by the name of the community he represents and never by his own name. For instance, in Congress the speaker would say: "The gentleman from (naming his state)." In a state legislature he would say: "The gentleman from (naming the locality he represents)." If the name or constituency of the person asking for recognition is not remembered, the chairman may, and often does, say: "The gentleman on the right" or "left" or "in front of the chair," pointing at him with the gavel.

After the member thus rising has been recognized by the chair he "has the floor," by which something very different from merely standing thereon is intended. If two or more members rise and address the presiding officer at the same time he, theoretically, should always give the floor to the person whose voice he first heard, not the person whom he first saw. In practice he is generally able to train his ears to wait upon his will and so hears first the one whom he prefers to recognize; but the house has the ultimate decision in the matter and may overrule the chairman's recognition. When the house is appealed to the question should be taken first upon the name of the person recognized by the chair.

17. **Making the motion.**—When a member has been recognized and so obtained the "floor," he states his proposition which, if in the nature of a resolution or motion, he must reduce to writing if so requested by the chair or any member. This applies only to the main question and to such motions as

are variable. The formal motions, which are always in substantially the same language, need never be written. Until the member "has the floor" the proposal of business by him is not in order, but the member may state his purpose in rising; if he demands the floor to introduce a privileged motion or any matter which has prior right, as, for instance, a point of order, he should be recognized at once.

18. **Petitions.**—Petitions stand in a class by themselves, and will here be considered parenthetically. A petition is a communication from persons not members of the body who, therefore, could not address the house directly. The member who presents it rises in his place and, when recognized, informs the assembly that he has a petition, stating briefly its object, which he desires to present. The usual form is: "Mr. Chairman (or Speaker), I beg leave to present the petition of _____ relative to _____." The presiding officer usually assumes that there is no objection to its reception and casts the burden of objecting, if any one desires to do so, upon the assembly. The petition, unless objection is successfully made, is brought to the table and there read by the clerk. It is then dealt with as its purpose requires and the assembly wishes.

19. **Ordinary business, how introduced—Seconding.**—Whenever a member has a proposition of his own to make (as distinguished from a petition) he puts it into the form which he desires to have it bear, rises in his place, addresses the chair, obtains recognition, and moves that it be adopted as the resolution, order, or vote of the assembly.

After the motion has been thus made it must, theoretically, have the support of another member who rises in his place and says: "I second the motion." This requirement of a second is based on the idea that if a motion has no other friend than the mover it is useless for the assembly to spend any time upon it. If a motion be not seconded common parliamentary law does not, in strictness, require the presiding officer to take any notice of it, except in those few cases in which one member alone has the right to institute or direct a particular proceeding. On the other hand, special rules sometimes require certain motions to be seconded by more than one member. In actual practice the requirement of a second is less and less insisted upon. No motion is seconded in the National House of Representatives except (if demanded) a motion to suspend the rules, and in few states does one ever hear a second in these days. If the presiding officer entertains a motion that ought to be second enough, unless some member insists to the contrary.

20. Business—When in possession of the house.—When the motion has been stated to the assembly by the presiding officer or read at his direction by the clerk, it is said to be "in the possession of the house." Until that time no member has a right to make any motion in relation to it, or debate it, or to ask the floor for either purpose. On the other hand, until then the mover may modify or withdraw it, but not after that, except upon leave given by the assembly. This principle, however, is frequently and wisely abrogated by a special rule permitting the

mover to modify or withdraw his motion "at any time before decision or amendment."

21. **Questions—How put.**—The business thus in possession of the house is called "the main question." The presiding officer says: "Mr. A," or "the gentleman from B," or "the Senator from the _____, moves so and so," or "offers the following resolution. Please to hear it read." After the motion has been stated or the resolution read he says: "The question is upon the adoption of the motion," or "resolution," and adds: "Are you ready for the question?" Then, and not until then, is debate in order. A motion to "reject" a measure is improper. The question is always upon its passage and it is then rejected, if so desired, by voting no. If no member has anything to say or propose, the chairman puts the measure to vote as follows: "Those who favor the question will say Aye—those opposed No." After the vote he says: "The ayes (or noes, as the case may be) appear to have it. Is it doubted?" If no one, rising in his place, doubts the determination, he adds: "The ayes (or noes) have it. The motion is adopted (or lost)."

If there is no reasonable doubt of the accuracy of the determination the chairman, in the absence of a special rule, is under no obligation to try it again, but in such case he should not ask, "Is it doubted?" It is the duty of all who care to vote at all to vote the first time and, if they fail to do so, they must abide the result. If, however, there is room for a reasonable doubt the vote should be tried again by sound of voices, and if the result is

still doubtful, a standing vote, or some other equally accurate method of determining it, should be tried. When a standing vote is ordered the chairman says: "As many as favor the motion will rise and stand in their places until counted." After the count he says: "You will please be seated. Those opposed will rise and stand in their places until counted." The count may be made by the chair or clerk or by tellers appointed by the chair.

22. Voting by roll call.—The assembly may always direct how any particular vote or how all votes shall be taken except that, under the National Constitution and those of several of the states, the yeas and nays may be ordered by one-fifth of the members present. This order may be made at any time before a vote taken in some other way is declared. The process of taking a vote by yeas and nays is as follows: The presiding officer says: "The question is (whatever the question may be). As many as favor the question will, when their names are called, answer 'Yes'; those opposed, 'No.' The clerk will call the roll." Thereupon the clerk calls each name in alphabetical order and as each member answers notes his vote. After the first name has been called the roll cannot be interrupted, even by the arrival of the hour fixed for adjournment. When the roll has been called through the chairman says: "Those voting 'yes' are —"; then the clerk calls the names of those noted as voting "yes." When this is finished the chairman says: "Those voting 'no' are —," and the clerk reads the names of those noted as voting "no." Then the chairman says:

“Those absent or not voting are—,” and the clerk reads their names. When all desired corrections are made the clerk ascertains the result and the chairman declares it.

If the number voting is less than a quorum that fact does not of itself determine the invalidity of the decision, but the house must be counted for the purpose and the result of this count will alone determine the facts, although it is the duty of every member of a deliberative assembly, if present, to vote when the question is first put.

23. When the presiding officer votes.—The presiding officer, when a member of the body, has, as already stated, an undoubted right to vote upon every question. In practice, however, he is not expected to vote, except when a ballot is taken or when his vote would change the result. He is expected to vote accordingly when his vote, if given on the side which he favors, would make a tie, or break a tie and thereby change the result, or complete or defeat a required two-thirds (or other fractional) vote and likewise change the result.

CHAPTER III.

SUBSIDIARY MOTIONS.

24. **Preliminary statement.**—We are now prepared to consider the various kinds of motions which may follow the launching of the main question and postpone the final vote upon it. When a motion is regularly before the assembly, no other motion can be received unless it be one which takes precedence of the question under consideration and is entitled to be first decided. Motions thus previous in their nature are divided into three classes or groups and called “subsidiary,” “privileged,” and “incidental.”

25. **The subsidiary motions and the precedence among them.**—Subsidiary or secondary motions are those which relate to a principal motion and are made use of to enable the assembly to dispose of it in the most acceptable manner. The usual subsidiary or secondary motions are: (1) To lay on the table; (2) for the previous question; (3) to postpone indefinitely; (4) to postpone to a time certain; (5) to refer to a committee; (6) to amend. These motions are entitled by the common parliamentary law to a certain precedence as among themselves.

The authorities are not entirely agreed about it, but the better opinion seems to be that to lay upon the table stands first; then the previous question, to postpone, either indefinitely or to a time certain, and to commit or refer (but with no precedence as

among these latter) and, last of all, to amend, although there is good authority for classing indefinite postponement and amendment as of equal rank. This common law order, however, is generally changed by a special rule in assemblies of importance. The order of precedence usually adopted is: (1) To lay on the table; (2) for the previous question; (3) to postpone indefinitely; (4) to postpone to a time certain; (5) to commit, refer or recommit; (6) to amend. A consideration of the form, nature, and effect of each of these motions is next in order.

26. Motion to lay on the table.—This motion is, theoretically, a motion to suspend the consideration of a question during the pleasure of the house. It is not debatable or amendable. When a question is tabled it usually carries with it all connected questions. Thus the main question carries all pending amendments and a tabled amendment carries with it the main question. However, motions to reconsider and appeals from the rulings of the chair, if tabled, carry nothing with them. Tabled matter may always be taken from the table at the pleasure of the house and, when called up, comes before the assembly precisely as it stood when tabled with all the amendments and motions then pending. While the motion to lay upon the table has first privilege among subsidiary motions, the motion to take from the table has no privilege at all. In the National House of Representatives, by a special rule or custom, tabled matter cannot be taken up again. While this is the practical result in all other bodies, it is not the necessary one. If the motion to lay upon the table

be defeated, the original question proceeds as before and the motion to table may be revived whenever new business has intervened or the original question has progressed one or more steps. A distinction is made between the "speaker's table" and "the table of the house." The latter table is alone the subject of the motion in question. Whatever is under the present consideration of the assembly, or, having been taken up, is for any reason temporarily laid aside, is said to be on the speaker's table.

27. Motion for the previous question.—This motion in the United States, and at the present time, has lost its original purpose and effect as used in England. In England the proposers of the motion desire a negative decision and use it to defeat the measure. We desire an affirmative decision and use it to forward the measure. Accordingly, while the effect of an affirmative vote both in Parliament and here is the same, viz., the putting of the main question immediately and without further debate, delay, or intervening motion of any kind, even to adjourn, the effect of a negative vote has come to be radically different in the two countries. In England all further discussion of the matter is suspended for at least the day, while in this country the consideration goes on as if the motion had never been made.

The different effect which our practice gives to a negative vote upon the question renders desirable a change in the traditional form of putting it. That form is: "Shall the main question be now put?" A better form would be: "Mr. A moves the previous question; as many as favor the motion will say 'aye,'

those opposed, 'no,' etc. The motion for the previous question, although debatable in England, is not debatable here and cannot be amended.

At common law it can be applied only to the main question, and therefore, if amendments are pending, inasmuch as the road back to the main question lies only through these amendments, the vote must be taken first upon the pending amendments in their order and lastly upon the main question, and all forthwith without debate.

It is customary, and very desirable, to give the previous question, by special rule, precedence over all subsidiary motions except to lay upon the table, and, whether with or without a special rule, it is customary also to permit it to be applied specifically to pending amendments or any other debatable motion which has for the time being taken precedence of the main question. In this case if the previous question be ordered, the vote under it will only be taken upon that particular motion against which it was specifically directed.

28. Motion to postpone indefinitely.—This motion is designed to avoid a direct vote on the question itself and to give its opponents an opportunity to try their strength at any stage of the proceedings. If carried, the matter is defeated; if not, it proceeds as before. This motion cannot be amended, but is not only debatable itself, but throws open the whole question to debate. By special rule, however, it is often made not debatable.

29. Motion to postpone to a time certain.—The object of this motion is to obtain time for considera-

tion or to make an opening for more pressing business. It is debatable as to its own merits, but does not open the main question. It can be amended as to the date, but when amendment is desired the best way to treat the situation is to consider the date blank and proceed to fill it from such dates as may be suggested, putting the question first upon the date which is most remote. When the motion prevails the matter becomes the order of the day at the time named.

30. **Motion to commit, refer, or recommit to a committee.**—When the assembly has much business and standing committees have been appointed, the committal is usually made, as of course on first presentation, to the appropriate one of those committees. In other cases the motion for reference may itself create a special committee for the purpose, or propose a reference to a committee to be raised. The reference may be with or without instructions. If instructions are given they must be followed. The motion to commit may be amended and is debatable, but the merits of the main question are not open for discussion, since that discussion will be only pertinent after the committee reports. If, however, the motion be to commit with instructions as to the main question, then debate can be had upon the merits.

31. **The motion to amend—Preliminary discussion.**—When the assembly is willing to consider the subject matter of a proposition, but is not satisfied with its form, the course of procedure is to bring it into satisfactory form by means of amendments or proceedings of a similar character.

There are two proceedings of a character similar to amendments which should first be considered.

(a) *The division of the question.* This division may be ordered by the assembly on motion, which motion may be amended. It is not the right of a member, as matter of course, to have a compound question divided into parts for action, although that right is sometimes asserted. A compound question can only be separated by moving amendments or moving for a division of it, unless the assembly has by special rule provided otherwise. A proposition, to be divisible, must embrace points so distinct that each could stand by and be complete in itself. If the assembly refuses to divide the question, a motion to strike out may accomplish the desired result. Another proceeding similar in character to amendments is:

(b) *The filling of blanks.* Sometimes a measure is submitted with blanks for dates or amounts. When it is proposed to fill these blanks, the propositions—although in effect amendments—are not treated precisely as amendments, but are marshaled and put to vote in such order that the largest sum or the longest time is tried first, and so backward until one is adopted and the blank filled. When two propositions might be better put into one, or one more properly distributed into two, or paragraphs or sections should be transposed, common consent for the changes may well be first sought before resorting to motions for amendment. If a proposition is rearranged so that the original numbering of its sections is wrong, they may be renumbered by the clerk and motions for that purpose are not needed.

32. **Amendments, strictly so-called.**—Recurring now to amendments, strictly so-called, every amendment which can be proposed, is itself susceptible of amendment, but amendments cannot be proposed beyond an amendment to an amendment. If an amendment to an amendment is voted down or adopted, then another amendment to the amendment can be proposed, but not before. When an amendment is pending all other proposed amendments must be confined to that. Two amendments to different parts of the main proposition cannot be pending at the same time. An amendment, once agreed to, cannot afterwards be altered or amended, except by general consent, although the main question as so amended may be finally rejected. The inconsistency of a proposed amendment with one already adopted is good ground for its rejection by the assembly, but not for its suppression by the chair. If an amendment is defeated it cannot be again proposed except with such changes as alter its sense. If an amendment by insertion is adopted the words inserted cannot be afterwards stricken out except in connection with enough other words to make a new proposition. If a motion to strike out a paragraph be lost, that same paragraph cannot afterwards be amended. The effect of the refusal to strike out is to make it a permanent part of the original proposition. If the motion to strike out be carried, the words in question cease to be a part of the proposition and cannot be reinstated except with the addition of enough others to make a new proposition. A motion to strike out or insert is, by the better practice,

indivisible. The rules immediately preceding are logical and should be observed.

When a motion is made to strike out a paragraph and insert another, the friends of each paragraph have a right by amendments to make it more acceptable and then the vote is taken as between the two in their perfected form. Likewise, when a motion to strike out or a motion to insert a paragraph is pending, it is in order for the friends of the paragraph to try to make it acceptable by amendment before the motion is put. An amendment by striking out all after the enacting clause and inserting a new bill is only one form of striking out and inserting. An amendment by striking out the enacting clause, so as to defeat the bill, gives way to amendments intended to remove objections to it. Amendments are not always proposed by friends of the measure or intended to improve it. It is entirely lawful so to amend a measure that no one will desire its passage. An amendment is never out of order simply because it is inconsistent with the original motion. The only limitation is that "no motion or proposition on a *subject* different from that under consideration shall be admitted under color of amendment."

After all desired amendments are adopted the proposition, as amended, must be put to vote again, even if the amendments have made an entirely new and complete motion. Likewise, a proposition adopted in paragraphs must be acted upon anew as a whole, and may be rejected on this final vote.

CHAPTER IV.

PRIVILEGED MOTIONS.

33. **Preliminary statement.**—The next class of motions which take precedence of the main question is privileged motions. These arise out of the needs of the assembly as a deliberative body. They concern only indirectly the main question, and that merely in so far as they delay action upon it, yet they take precedence of all others. This is because they are essential not only to the proper consideration of that question but to the existence of the assembly itself as a working parliamentary body. They are unequal in rank among themselves. Three are called “privileged motions.” Two classes are called “questions of privilege.” The privileged motions are: (1) To adjourn; (2) to fix the time to which to adjourn; (3) to take a recess, and a clear knowledge of the rules governing them is necessary.

34. **The motion to adjourn.**—The motion to adjourn seeks to enable the assembly to rest and is highly privileged. It is frequently said that “a motion to adjourn is always in order,” but there are too many exceptions to make it safe to lay down the rule quite so epigrammatically. For instance, a motion to adjourn cannot be made while a member has the floor, cannot interrupt the taking or verification of a vote and cannot be repeated until some business has intervened.

When the assembly has not fixed the time to which it will adjourn, and that time is not fixed by law, adjournment would be equivalent to dissolution and is consequently debatable and opens up a field for discussion that is wide indeed. The motion to adjourn which is privileged is merely a proposition to stop then and resume at another time. If made when no other business is pending, it is claimed by high authority that it can be amended and debated like other questions. If made when other business is pending, it can neither be debated, or amended, and takes precedence of everything. To have this rank, however, the motion must be simply to adjourn without the addition of day or time. If another element is added it becomes debatable and amendable. A motion to adjourn does not require a quorum, neither does a motion to fix the time to which to adjourn if the time has not previously been fixed. The effect of an adjournment upon pending business is probably to postpone its consideration to the subsequent day and on that day, after the reading of the journal, it should be taken up in the condition in which the adjournment left it. However, the authorities differ about this.

35. The motion to fix the time to which to adjourn.—The motion to fix the time to which to adjourn is also highly privileged when no time has been previously fixed as the regular hour of meeting after adjournment. In that case it takes precedence of any pending motion, including a motion to adjourn, but not a motion for a recess for a definite time. If the assembly, however, has fixed the time for reas-

sembling after adjournment, a motion to fix a different time has no priority over pending motions.

36. Motion to take a recess.—When the time has been fixed at which the session shall be resumed, a motion for a recess to that time, like a motion to adjourn for which it is the equivalent, is highly privileged and is not amendable or debatable. This is likewise true of a motion for a recess for a definite time short of the time so fixed, or at least, on principle, this should be so.

37. Questions of privilege.—Questions of privilege are, first, those affecting the assembly collectively, and, second, those affecting the rights, reputation, or conduct of members individually. Examples of breaches of privilege of the first class are disturbances, divulging the secrets of the body, or tampering with its records. Examples of the second class are an attempt to bribe a member, or the slander of a member. Questions of privilege are preferred as between themselves in the order above given, viz., first, questions which relate to the assembly; second, questions which relate to members; but either take precedence of all other motions except the three privileged motions when those are not debatable or amendable. It is said that they may even take a member from the floor and interrupt his remarks.

38. Questions of privilege—How raised.—Questions of privilege are addressed to the presiding officer. The member, rising, says: “Mr. Chairman, I rise to a question of privilege.” The Chairman says: “The gentleman will state his question.” The member thereupon states the question and the chairman

decides whether it is privileged or not. If the ruling be that it is not privileged the business before the assembly is resumed. If the question be privileged, then it is for the assembly to take action upon it as upon any other matter. After it is disposed of the interrupted business is resumed.

39. Motion for orders of the day.—A motion to proceed to the orders of the day is to a considerable degree privileged and therefore is sometimes classed with privileged motions. This motion is not debatable or amendable. It may be made when a member has the floor, and takes precedence of everything except the three privileged motions and questions of privilege. If decided in the negative, the orders are discharged and the pending business proceeds. The form is: “Shall the orders of the day be taken up?”

CHAPTER V.

INCIDENTAL MOTIONS.

40. Preliminary statement.—Incidental motions are caused by considerations incidental to the matter pending at the time, and are consequently to be decided before the matter which gives rise to them.

They pertain to: (1) The question of consideration; (2) questions of order; (3) reading of papers; (4) withdrawal of a motion; (5) suspension of a rule; (6) the method of consideration.

41. The question of consideration.—Some member, when the main question is stated by the chair, may think that the assembly should not consider it at all. He accordingly rises and says: "Mr. Chairman, on that I raise the question of consideration." The form of the question to be thereupon put without debate is: "Will the assembly consider the motion (or resolution)?" The question of consideration applies to the main question and to no other. It formerly was put as a matter of course, but of late years, if the question is not raised, the willingness of the assembly to consider the matter is assumed. The question must always be raised, if at all, before consideration has begun.

42. Questions of order.—Another obstacle to consideration is a point of order, which is a claim that the question cannot be considered because it conflicts with some parliamentary rule or some order of the

body. This should, strictly, take precedence of an objection to consideration, for if the question is not in order it is useless to vote that it shall be considered. When a question of order arises it interrupts the consideration of the subject out of which it arises until the question of order is disposed of. When a member thinks that the matter proposed or pending is irregular, he rises in his place and says: "Mr. Chairman, I rise to a point of order." The Chairman replies: "Mr. A will state his point of order." The presiding officer then, either with or without debate as he may himself determine, decides the point so raised. He may suggest the point of order himself, should no member raise it. An illustration of a point of order would be an objection to the consideration of a motion to amend while a motion to postpone was pending.

43. **Appeals.**—Inasmuch as appeals are most frequently taken from rulings on points of order, their consideration follows. When a member appeals from a ruling of the chair, the presiding officer should insist upon a second before entertaining the appeal. Both the member appealing and the member seconding the appeal should, as in the case of all other motions, rise in their places and address the chair. The form is: "Mr. Chairman, I respectfully appeal from the ruling of the chair." After the appeal is seconded, the chairman says: "The chair rules that (stating the ruling). Mr. A appeals from this decision of the chair. The question is: Shall the decision of the chair stand? Are you ready for the question?" The question is debatable and the de-

bate is generally participated in by the presiding officer standing in his place. In all other cases, the presiding officer when taking part in debate should do so from the floor, having called someone to take the chair. All questions of order arising under an appeal are decided peremptorily by the chair. The presiding officer, when a member of an assembly, may vote upon the appeal, and, in case of a tie, the ruling stands in spite of the form in which the question is put. A decision of the chair always stands until set aside by a majority vote.

44. **The reading of papers.**—Recurring now to incidental motions, the next relates to the reading of papers. When a paper embodies a matter upon which the assembly is to take final action, any member may have it read for his information. As to other papers, however, it is not the right of a member to read them himself or to have them read without leave of the assembly. This, being incidental to the matter under debate, must be decided first.

45. **Withdrawal of a motion.**—In the absence of a special rule to the contrary a motion, when made and submitted by the chair so as to be in possession of the assembly, cannot be withdrawn or modified by the maker without leave of the house, obtained upon a motion which is, of course, incidental to the other.

46. **Suspension of a rule.**—When any desired proceeding is prohibited by some special rule, it is necessary to move for the suspension of the interfering rule. This motion is consequently incidental to that proceeding and supersedes it until decided.

47. **The method of consideration.**—The last incidental motion to be discussed is a motion as to the method of consideration. This motion is made only when there have been no general rules established on the subject. Where these exist no exception can be grafted upon them except in one of the ways already indicated.

48. **General remarks.**—Incidental motions, being in order at almost any stage and relating as they do to limitation of debate and order of action, give the body complete control of its business. They are generally adjusted by agreement and at any rate should be decided after brief debate. As to their rank among themselves, a question of order takes precedence of all the others. The other incidental motions have no precedence over one another; each must be decided before another can be put or any action taken on the question pending when the motion was made. Incidental motions are not debatable or amendable except motions relative to the method of consideration, which are amendable and briefly debatable, and questions of order, which may be debated if the presiding officer so requests.

CHAPTER VI.

SPECIAL MOTIONS.

49. **Reconsideration.**—There is one more motion, in a class by itself, a knowledge of the rules applicable to which is necessary to a working knowledge of parliamentary law. That is the motion for reconsideration. A motion to reconsider, if allowed, reopens the entire question for further action precisely as it stood just before the vote reconsidered was taken, and, when no further discussion or alteration is desired, the presiding officer must again put the question to vote. Any former order as to the method of taking the vote is no longer in force.

If it is proposed to change any action taken prior to the final vote upon a question, the votes which have been taken, beginning with the final one, must be reconsidered in reverse order until the one desired to be changed is reached. If, for instance, the vote on an amendment, whether affirmative or negative, is unsatisfactory, the vote on the main question must first be reconsidered and then the unsatisfactory vote on the amendment.

A motion to reconsider is applicable to almost all votes. The principal exceptions are a vote to adjourn, to lay on the table, for suspension of the rules, and to reconsider, with sometimes, by special rule, a vote ordering the previous question. The same vote can be reconsidered but once.

A motion to reconsider is not in order after some action has been taken by the assembly under the vote proposed to be reconsidered. For instance, a motion to commit cannot be reconsidered after the papers have been delivered to the committee. A motion to reconsider must be made during the day of the vote sought to be reconsidered. It may be made while a member has the floor and noted on the record to be acted upon at such subsequent time as the business of the assembly permits, even upon a subsequent day.

Under the customary modern practice only some member who was in the prevailing vote, whether that was affirmative or negative, may move to reconsider. The presiding officer may inquire of the mover whether he was in the prevailing vote. A motion to reconsider is debatable whenever the motion on which the vote in question was taken is debatable, otherwise not. Accordingly, a debatable matter may be debated three times. Once before the first vote, once again on the motion to reconsider that vote, and the third time after the vote has been reconsidered.

50. **Motions on disagreeing action.**—Brief mention should be made of certain motions—three in number—which are peculiar to the situation created by disagreeing action between the two houses of a legislature. When one house passes a bill it is transmitted to the other. If the second body takes different action upon it the bill comes back to the first house with a memorandum of the disagreeing action. Then either one of three motions is in order. If the

first house desires to change its original action and agree with the other house it votes "to recede and concur." If it desires to try to persuade the other house to agree with it the motion is "to insist and ask for a committee of conference." If it proposes to stand pat, whatever happens, it votes "to adhere," and that kills the bill, unless the other house backs down.

CHAPTER VII.

SUNDRY GENERAL RULES.

51. **Rules enumerated.**—A few general rules for one's guidance when participating in deliberative assemblies are as follows:

(1) It is most unparliamentary to make a principal motion and a subsidiary one relating to it at the same time, as, for instance, to move the adoption of a resolution and the previous question upon its adoption both together.

(2) When a member has obtained the floor, he cannot be interrupted except, generally speaking, by a call to order, a question of privilege, a motion to proceed to the order of the day, and a motion to reconsider to be noted on the record. Unless the disposition of these motions disposes of the speaker also, he may proceed when they are finished. Calls of "order," "order," or "question," "question," made by members from their seats, are always disorderly and should be rebuked by the presiding officer. A member can properly take no part in the proceedings from his seat, except to vote—a rule far too seldom observed.

(3) The last word is frequently conceded to the proposer of the pending question as a privilege, but, although often claimed, is not a right.

(4) The member speaking should always address his remarks to the presiding officer and not to his

fellow members, and speeches should follow, not precede, the motions to which they refer.

(5) A member having the floor may yield it for a question addressed to himself without losing his right to continue, and likewise when he yields for a motion to adjourn, or to take a recess, or that the committee of the whole rise, he is entitled to resume at once if either action be lost, and if the motion be carried he is entitled to resume when the subject is next before the body. But when he yields the floor for any other purpose, he yields it for all.

(6) Members should refrain from referring to each other by name. Some equivalent expression like "the last speaker," or "the gentleman from A," should always be used, if possible. The official, and not the personal, character of the party addressed must be kept in view.

(7) A member's remarks must always be pertinent to the subject under discussion, otherwise he may be called to order.

(8) While the nature or consequences of a pending measure may be strongly criticized, it is not permissible to speak in similar terms of a measure already passed, for that would be a reflection upon the assembly, and, similarly, while a pending measure may be roundly abused, those who favor it may never be.

(9) The general rule is that no member shall speak more than once to the same question, except by leave of the assembly; but he may speak the second time to clear a matter of fact or explain an ambiguity in some material part of his speech.

CHAPTER VIII.

COMMITTEES.

52. **Membership.**—The member who makes the motion for the appointment of a committee is not entitled to be chairman or even a member of it. That he is so entitled has, however, come to be so generally believed that not to appoint him is likely to be considered an act of discourtesy. The person first named in announcing or electing a committee is usually considered to be chairman, but the committee may disregard that and choose its own chairman unless the assembly otherwise directs.

53. **The report.**—“A majority report” is a misnomer. There can be but two reports, “the report of the committee” and “a minority report.” This latter can technically be presented only by leave of the assembly, which is seldom refused. A report can only be agreed to in a meeting of the committee. It cannot be made up from opinions of members obtained outside. It should always be the result of joint discussion.

54. **Treatment of the report.**—The “reception” of a report adopts nothing, but ipso facto, discharges the committee, unless it be a standing one. The “reception” of a report merely admits its subject matter to the body for consideration in the light of the report. The report is simply a vehicle in which the real matter for action is brought back to

the assembly and the question is upon that matter and not upon the vehicle.

55. Committee of the whole.—Deliberative assemblies frequently resolve themselves into the committee of the whole in order that some specified subject may be more informally and fully discussed than it can be in the assembly itself. This is due to the fact that the ordinary rules of parliamentary law are greatly relaxed in committee of the whole, and while a vote there affords a test of strength, it does not bind the assembly. The course of procedure is substantially as follows: A member moves that the assembly resolve itself into the committee of the whole to consider some pending matter specified in his motion. If this be voted, the presiding officer names the person who shall act as chairman and himself leaves the chair. If it is desired to object to the chairman so named, the objection should be made before the presiding officer leaves the chair. In practice objection is never made. The clerk of the assembly still acts, but makes no record. He merely keeps such memoranda as will assist the chairman. The report made by the chairman to the assembly is the record of the committee and is preserved in the journal of the assembly.

The quorum of the committee is the same as that of the assembly unless the assembly otherwise orders. If it is found that a quorum is not present the fact is reported at once to the house. The committee cannot limit debate. Each member may speak as often as he can get the floor and as long as he chooses, subject to the reasonable control of

the chairman. Only the assembly, acting through the chairman, can limit debate. The yeas and nays cannot be called. The only subsidiary motion permissible in committee of the whole is to amend. The committee cannot adjourn. The motion which, when carried, terminates its session is "that the committee do now rise." Thereupon the committee rises and the regular presiding officer takes the chair. If the consideration of the business entrusted to it has not been finished, the motion is, "that the committee do now rise, report progress, and ask leave to sit again." After the presiding officer has resumed the chair and the chairman of the committee has gone to his seat in the assembly, he rises, addresses the presiding officer, and says: "Mr. Speaker (or whatever title is appropriate), I am instructed by the committee of the whole to report that, having had the business committed to it under consideration, it has arrived at no conclusion with reference thereto and asks leave to sit again."

If a conclusion has been reached, the committee instructs its chairman so to report, and then instead of the foregoing the chairman says: "Mr. Speaker, I am instructed by the committee of the whole to report that it has finished its consideration of the matter committed to it, and I am ready to make known its conclusions whenever the house shall think proper." The presiding officer generally replies: "Please proceed," and the chairman then reports the action of the committee, and the clerk enters it on the minutes of the house.

BIBLIOGRAPHY.

As a text book upon the Common Parliamentary Law *Cushing's* treatise is standard throughout the United States, and an abridged edition of this with notes by *Albert S. Bolles* is admirable. *Roberts'* and *Reed's* manuals are convenient and valuable.

Those who are curious to delve in the subsoil of the subject are referred to the works of *Hackwill*, *Scobell*, *Elsyng*, *Pettyt* and *Hatsell*, to *Jefferson's* manual already mentioned and to the exhaustive scientific treatise of *Mr. May*.



QUIZ QUESTIONS

LAW OF PUBLIC SERVICE COMPANIES—ESPECIALLY COMMON CARRIERS

(The numbers refer to the numbered sections in the text.)

1. Distinguish between the duties of a public service corporation and of a private corporation in their dealings with patrons and customers.
2. State briefly the origin of what are known in our law as public service corporations.
3. Name and define five public service corporations and in each case state whether or not an individual, should he be engaged in the same line of business, would be subject to the same rules as is the corporation.
4. What is the basis for public control of or intervention in private enterprises?
5. What is meant by a monopoly?
6. In considering the question of unfairness in competition what would you say ought to be the controlling element?
7. A is the owner of a warehouse and dock privileges. Does that fact subject him to the rules and regulations governing public service corporations?
8. Are telegraph and telephone corporations rated as common carriers?
9. To what extent, if at all, may a public service corporation justify apparently excessive charges?
10. What is the theory upon which public service corporations are granted franchises embracing exclusive rights and privileges?
11. A owns a building which he furnishes as a hotel, and starts

- in business. Does he thereby subject himself to the duties and obligations of one engaged in public service?
12. A is engaged in the grocery business; B purchases goods from him and desires to have them delivered at his home. Is A obliged to accommodate him?
 13. What is the chief characteristic of public employment?
 14. Jones, living in a small town where there is no hotel, occasionally furnishes lodging and meals to applicants. Does he thereby become an innkeeper?
 15. A, desiring to express one hundred pounds of dynamite, properly boxed, offers to pay the charges for shipment thereof. Must the express company transport the same?
 16. Where a corporation professes to transact two lines of business, one of a public, the other of a private nature, may it be held to a public duty in matters relating to the private business?
 17. A demands that a railroad company furnish him cars with which to ship stock; the company fails so to do and A suffers loss thereby. May he recover against the railroad company?
 18. A gas company is operating in a town of 5,000 inhabitants. A new enterprise is established in that town, bringing with it many employees, some of whom apply to the gas company for service. Must the gas company serve them?
 - 19-20. A corporation has been conducting the business of a wharfinger. It now desires to abandon that business. How shall it go about accomplishing this purpose?
 21. State the distinction in law between the duties of public service corporations and those of private corporations, or individuals not engaged in public service enterprises.
 22. What is the underlying principle of the liability of a corporation or individual engaged in public enterprise?
 23. May the public as a body politic maintain an action for loss occasioned by the fault of a public service corporation, or must such actions be instituted by the individual suffering special injury?
 24. May a public service corporation defend an action brought against it to compel performance of its duties, on the ground that the contract relied upon was made with a person under legal disability?

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25. A seeks to recover against a common carrier for injuries to his person; he fails to show that the relation of carrier and passenger existed. Has he any other ground upon which he may recover?
26. A public service corporation contracts with the tenant of certain premises to furnish him water, but fails to do so. Who may maintain the action, the tenant or the owner of the premises?
27. A railroad company sees fit to operate its own express cars. In the absence of express legal provisions forbidding this, may it be prevented from so doing?
28. An express company has a contract with a railroad company extending over a number of years; the railroad company abrogates it; litigation follows. What interest, if any, has the public in such litigation?
29. A railroad extends from A to B; a person desires to ship goods to C, a point beyond B; the railroad refuses to accept goods for shipment beyond B. May the intending shipper maintain an action?
30. A desires to ship goods from New York to San Francisco by rail, and makes a contract with a railroad company which agrees to carry and deliver them. The goods are lost in transit, but beyond the termination of the line of the original carriers who made the contract. Against whom should the shipper bring his action?
31. An applicant for a certain service agrees to comply with all reasonable rules and regulations; the public service company has made its own rules and regulations. Who is to decide whether or not they are reasonable?
32. A tenders baggage at a railway station; the company has not the facilities at hand to forward it until the following day; A suffers loss. May he recover?
33. One desires to ship goods. When and where should he offer them to the carrier for shipment?
34. May the carrier require the passenger or the shipper to enter into a contract regarding carriage or shipment?
35. A tenders for shipment a piano, unboxed and otherwise unprotected. Is the railroad company justified in refusing to receive it?

36. What duty rests upon the carrier with reference to discrimination between persons generally?
37. What protection has a public service corporation against loss of the amounts that may become due for its services?
38. The carrier or innkeeper does not demand payment in advance, but accepts the goods of the passenger or guest, as the case may be. Does this fact have any effect upon the duties and obligations of carriers and shippers or innkeepers and guests, respectively?
39. What is the rule regarding the unit of service as applied to public service corporations?
40. Jones is a shipper, and is in arrears to the railway company for charges on prior shipments. He tenders other goods for shipment and offers to pay charges in advance. Must the railroad company accept these goods?
41. May a common carrier by special contract become a private carrier?
42. A delivers goods to a common carrier for shipment on Monday; but the goods are not shipped on that day; on Thursday a fire occurs and the goods are destroyed. Is the liability of the carrier that of warehouseman or common carrier?
43. Suppose A, desiring to make a shipment of goods, delivers to the railroad company a warehouse receipt for such goods. Does this constitute delivery to the carrier?
44. A, desiring to become a passenger, goes upon the premises of the carrier in an intoxicated condition and so causes a disturbance. Is the carrier bound to receive him?
45. The carrier is a corporation; its agent undertakes to transport goods on his own account, but this fact is unknown to the shipper; the goods are lost. Is the carrier liable?
46. A enters an inn for the purpose of becoming a guest; he places his valise in a chair, but while he is in the act of entering his name upon the register, the valise disappears. May he maintain an action against the innkeeper?
47. To what extent is a carrier liable for injuries to one riding upon its conveyance who has failed to comply with reasonable rules and regulations relating to his carriage?
48. A farmer ships a carload of cattle and accompanies them

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to market for the purpose of caring for them en route.
Does this relieve the carrier of liability, as such?

- 49-50. State the scope and limitations of the regulations which a public service company may prescribe.
51. A procures a check for his baggage upon the back of which are printed restrictions as to value; the baggage is lost. May A recover beyond the amount of such limitations as to value?
52. A person enters a train and refuses to pay the regular fare. What may the conductor lawfully do?
53. May a carrier require that freight for shipment be tendered at a certain place and within a certain time prior to the departure of trains?
54. Assuming the schedule in operation is adequate, what notice, if any, is the carrier required to give when it desires to make substantial changes therein?
55. What, if anything, may the public supplying company do to prevent wastage in the thing supplied?
56. A street car company posts notices in its cars to the effect that the conductor will not furnish change beyond the amount of \$2. Is this regulation valid?
57. The subscriber to telephone service neglects to pay the charge in advance; the service is cut off, to his damage. Has he any remedy?
58. Is it lawful for the carrier to establish a regulation requiring additional compensation from those not procuring tickets before entering its trains?
59. A ticket is presented to the conductor of a train; it is bad on its face. May the conductor in all circumstances refuse to accept such ticket?
60. If a person is improperly refused passage upon a train by the conductor, is the conductor liable, or is the carrier liable?
61. What degree of diligence is required of the carrier in the performance of its duties as such?
62. To what extent, if at all, is the carrier liable for delay in the transportation of goods? of passengers?
63. As between connecting carriers, what, if anything, will excuse the second carrier for unreasonable delay?

64. What is meant by deviation and under what circumstances will it render the carrier liable for loss?
65. Where deviation is proved is it necessary to establish negligence to maintain an action?
66. The carrier selects the more dangerous of two routes, by reason whereof the goods are lost. Is the carrier liable?
67. A passenger, fearing assault, appeals to the conductor for protection. What ought the conductor to do?
68. A conductor, without just excuse, assaults and injures a passenger; the passenger brings action against the carrier. May he recover?
69. A passenger entrusts his hand baggage to the conductor. If it is lost through the negligence of the conductor, may the passenger recover from the carrier?
70. Robbers enter a train, and the train crew makes no effort to prevent it; a passenger is robbed. May he maintain an action against the company?
71. Suppose the relation of carrier and passenger does not exist at the time of an assault by the conductor. May the company be held liable?
72. An innkeeper, with knowledge, exposes a guest to infectious disease in his hotel, and the guest becomes ill. May he recover against the innkeeper?
73. What is the liability of a common carrier for the loss of goods properly entrusted to it for shipment?
74. What is meant by liability as an insurer and to what extent is such liability applicable to carriers of goods?
75. What degree of care must the carrier of passengers exercise to relieve itself of responsibility for personal injuries suffered by them?
76. In the case of purely gratuitous services, what is the liability of the carrier of goods?
77. What constitutes baggage and what is the liability of the carrier in case of its loss or damage?
78. Is a sleeping car company subject to the same rules of law with reference to its liability, as govern innkeepers?
79. Under what circumstances may a telegraph company be held liable for mistakes in the transmission of messages?
80. A company furnishing electric light undertakes to wire a

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- house; the wiring is defective and a fire occurs. May the owner suffering the loss maintain an action?
81. If the carrier defends on the ground that loss was occasioned by an "act of God," what must he prove?
 82. What is meant by "the public enemy" and under what circumstances may it be available as a defense to the carrier?
 83. Suppose the shipper does not truthfully disclose the fact that the goods are perishable and loss occurs through this fact. May the shipper recover in such a case?
 84. After delivery to the carrier the shipper, without the knowledge of the carrier, does some act which increases the probability of the loss of the goods, and loss actually occurs. Is the carrier liable in such a case as an insurer?
 85. In what manner, if at all, may carriers and innkeepers limit their extraordinary liability?
 86. Is a general notice issued to the public by the carrier of goods sufficient to protect it against liability as an insurer?
 87. May a carrier, by private contract with the shipper, relieve itself from liability for loss occurring through its negligence?
 - 88-89. To what extent does public policy enter into contracts between public service corporations and their patrons?
 90. A tenders a package to a common carrier for shipment, fixing the value thereof at \$50, and is charged a rate based on such valuation. In case of loss what is the extent of his recovery?
 91. A bill of lading provides that all claims for loss or damage to goods thereunder must be made within ninety days. May the carrier rely upon such stipulation?
 92. What degree of care must the carrier observe regarding its employees and to what extent may it exempt itself therefrom by contract?
 93. Does the law of the public service govern when the carrier undertakes to transport goods or passengers gratuitously?
 94. A person receives a pass from a carrier; the pass recites that the carrier will not be liable for injuries. Under what circumstances, if at all, may such passenger recover?
 95. An express messenger is injured in an accident resulting

from the fault of the carrier. What must he show in order to recover?

96. What evidence would you offer to establish the fact that the defendant is a public service corporation?
- 97-98. The carrier delivers goods safely at their destination and places them in its warehouse; consignee, though notified, does not immediately remove them; fire occurs and the goods are destroyed. What is the carrier's defense, if any?
99. Is the carrier of goods by freight bound to give notice of their arrival to the consignee? If such notice be given, what is the duty of the consignee?
100. How far does custom regulate the actual delivery of goods to the consignee by the carrier?
101. What distinction obtains regarding the duty of the carrier in the delivery of goods in packages and the delivery of goods in carload lots?
102. A passenger on a delayed train upon arriving at his destination found a heavy rainstorm then raging, and requested the privilege of remaining in the coach; this was granted him by the conductor. When did the relation of carrier and passenger terminate?
103. Is the carrier protected by making delivery to the true owner of the goods, irrespective of who may be consignor and consignee?
104. Where the carrier is not at fault, but delivers to the wrong person as consignee, will it be liable to the consignor or true consignee?
105. A public service company wrongfully refuses to serve an applicant. What must it show in order to avoid liability?
106. There is a general strike upon a railroad; the government interferes. Does this abrogate the duty of the carrier to accept goods and passengers?
107. A steamship is permitted by law to carry 1,000 passengers; A applies for passage subsequent to the receipt of the 1,000 passengers on board and is refused. May he maintain an action?
108. May a carrier of passengers refuse to receive one who it knows desires passage for the purpose of engaging in a game of chance while upon the train?

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109. A dramshop applies for and secures telephone service; thereafter its license is revoked, but the keeper undertakes to continue the business. May the telephone company lawfully refuse further service?
110. A passenger suddenly becomes violently insane. What ought the conductor to do?
111. A conductor learns that a passenger is ill with smallpox. May he insist upon the passenger leaving the train without refunding the fare?
112. Is a carrier bound, without additional compensation, to afford special facilities in the care of persons under physical disability, as for instance a blind person?
113. What state of facts will justify a carrier in suspending service in whole or in part?
114. A general railway strike occurs, and grows to such proportions that the authorities are unable to control it. May the carrier successfully plead this as an excuse for failure to carry?
115. State the general rule of law with reference to the right of public service corporations to refuse service to particular persons or classes of persons?
116. Several farmers combine to make a large shipment of stock; they place it in the name of one man and tender it to the carrier. May the carrier properly refuse to accept it?
117. State generally the extent to which public service corporations are bound to furnish proper facilities for their patrons.
118. A teamster is injured owing to his wagon breaking down by reason of defects; the employer shows that the wagon was purchased from a reputable concern and was regularly inspected for repairs. May plaintiff recover?
119. It becomes necessary for a municipality to extend its water mains. How should it proceed to do so?
- 120-121. A railway company, operating its line through a farming section, is called upon to move an unusually large crop. If unable to move it promptly, is the company liable?
- 122-123. A railway company arbitrarily places its station at an

- inconvenient point. May it be forced to move this station? If so, in what proceedings?
124. State the general rule governing carriers of freight as to providing adequate facilities for receiving and shipping.
125. The coal supply of a railway company is becoming exhausted. Will the company be justified in taking another company's coal from cars in shipment, after tendering due compensation therefor?
126. May the shipper by special contract and payment of extra compensation secure superior facilities both as to time and accommodations?
127. A becomes a guest of an inn and is assigned a particular room after he has examined and approved of it. What right, if any, has the innkeeper arbitrarily to change A to another room less desirable, even though for a smaller compensation?
128. State in a general way the duty of a carrier of grain and live stock as to providing facilities to move the shipments.
- 129-132. Under what circumstances may carriers and shippers fix their own rates for transportation? In this connection would you take into consideration the amount of the capital invested by the carrier?
- 133-134. In determining the question of proper charges, what deductions, if any, should be made from the gross receipts of public service corporations?
135. State your idea of the true basis for rate making by public service corporations.
- 136-138. In establishing through rates for shipment, is a carrier permitted to charge an excessive rate over a portion of the route and a diminutive one over the remainder?
- 139-140. A and B, two shippers from the same point, apply for rates on the same class of goods; through favoritism A receives a lower rate than B. Has B any remedy?
141. A railway company, being required to publish its rates, does so. May all intending shippers depend upon receiving service at these rates?
- 142-143. Under what circumstances, if any, may the carrier, in making rates, take into consideration the volume of business given him by the shipper?

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144. Upon what theory may the carrier make a less rate for carload lots than on package freight of like classification?
145. What is meant by discrimination in making rates and to what extent is the rule against it now enforced?
146. In fixing rates for carriage a carrier makes a much higher rate on certain commodities than on others. Under what circumstances will this be upheld?
147. A carload of sugar is shipped from Chicago to a point distant 150 miles at a certain rate; upon the same train is a carload of sugar in transit to a point 200 miles from Chicago. The cost of shipment for the latter consignment is less than for the former. May the first shipper effectively complain?
148. Discuss relative discrimination by public service companies from the standpoint of their public duty.



QUIZ QUESTIONS

LAW OF MUNICIPAL CORPORATIONS

(The numbers refer to the numbered sections in the text.)

1. Define a municipal corporation and distinguish it from (1) a county, (2) a township, (3) a town.
2. Which ones of its essential elements seem to you to be more corporate, and which ones more municipal?
3. What is the mode and method of creating a municipal corporation in the United States?
- 4-5. What kind of bodies have power to create municipalities? Name those having such power.
6. (a) Who must take formal action in our country in order to set up and establish an actual municipal corporation performing the functions of such an organization? (b) How does a legislature exercise its authority in creating a corporation?
7. Define a general charter, and describe the creation of a municipality under it.
8. What is a constitutional provision, and what provisions of this kind are generally found in the United States for municipal corporations?
9. Suppose a constitution requires a popular vote to authorize municipal incorporation, but a town organizes and operates a corporation without such election. Are its corporate acts valid?
10. In America may a municipal corporation have lawful existence without express legislative authority, plainly and positively directing and warranting its organization and operation?
11. (a) Suppose the residents of Podunk, for which a special municipal charter has just been granted, refuse to act

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- under it. Is Podunk in that case a municipal corporation?
- (b) Suppose that later one-tenth of the voters actually organize a corporate government under said charter, against the protest of the other nine-tenths. What then is the status of Podunk?
12. What is the method of testing the validity of a municipal corporation?
13. What alterations may be made in a municipality? Who may make them, and how?
14. May a municipality be cut in twain, and formed into two separate corporations? What becomes of the corporate property?
15. (a) May two distinct and separate contiguous municipalities without their consent be merged or consolidated into one corporation? (b) Do you know or have you heard of such action being taken anywhere?
16. What limitation is there or can there be upon the power of a legislature to create, alter, amend or destroy a municipality? Give reasons.
17. (a) How is the life of a municipal corporation lawfully ended? (b) Suppose that for five years not a single corporate act is done. What is then its status? (c) May resident citizens then revive the corporation without legislative action?
18. Describe a special charter and a general charter and note the difference between them.
19. What were the form and nature of the royal municipal charter of England in the XVI century?
20. (a) Wherein did this differ from the standard American charter of the XX century? (b) State some of the general provisions of the latter.
21. (a) What is the meaning of the phrase "general welfare clause" in a municipal charter? (b) What special powers have the courts declared were embraced within this phrase, "general welfare clause?" (c) What particular powers have the courts refused to sustain under this clause? (d) Name and define the two great classes under which all municipal powers are classified.
22. (a) Under modern rules, what persons are considered to be members of a municipality? (b) May a municipal cor-

poration exercise police power beyond its own corporate limits?

23. Is it essential to the validity of a municipal charter that the people within its territory shall accept it? Give the reason.
24. (a) Podunk exists under a special municipal charter. Must she produce her charter in court when she sues? Why? (b) Is the rule the same under a general charter? Why?
25. How is a municipal charter obtained under general law? Describe the process.
26. Name and define the various classes of municipal powers.
27. (a) Are the words "incorporate," "establish," "found," "erect," "create," or any of them essential in a municipal charter? (b) What form of words is sufficient?
28. Without process or notice of any kind a legislature repeals the act creating Podunk a municipality. What is the effect?
29. If a statute is enacted closing the public schools and converting the municipal school house into barracks for militia, is it a valid law? Why?
30. (a) By a certain act the Podunk police are removed in a body and other persons appointed in their stead. What is the effect? (b) In the same act the commissioners operating the Podunk trolley cars are also removed and persons named to succeed them. What do you say of this act? Why?
31. Again suppose you are municipal treasurer of Podunk, and are by statute directed to pay all corporation money collected by you to the county treasurer, or the state treasurer. What will you do?
- 32-33. Podunk's franchise to build and operate water works is repealed. What is the effect? Suppose (a) no work has been done, (b) the water system is in full operation.
34. (a) Podunk obtained a bond loan of \$50,000 on a promise expressed on the face of the bonds that no more bonds should be issued by it until these were paid; before payment preparations are made to duplicate this loan. As one of the bondholders, what may you do to protect your loan? (b) There is a disputed claim against your town for \$10,000 for a cranky, unreliable fire engine. On a fair municipal election your people vote, ten to one, not to

- pay it. The legislature thereupon levies a direct tax on your town for \$10,000, and appropriates it to this claim. What will you do about it? Why?
35. May the legislature convert a city hall into a county court house? or a market house into a state asylum?
- 36-37. May the state levy a tax to compel a city to pay the expense of changing her macadam streets into asphalt avenues? Give a summary of the correct trust doctrine of the relation of state and city to municipal property.
38. What is a corporate meeting, how is it assembled and how conducted?
39. What difference, if any, is there between the functions of a mayor and those of a councilman or alderman?
40. (a) Of what practical utility are the minutes of corporate meetings? (b) For what purposes may they be used? (c) And for whom?
41. Distinguish between a "by-law," a "resolution" and an "ordinance."
42. How are ordinances enacted and given effect as laws?
43. What are the essential qualities of a valid ordinance?
44. What have you to say of an ordinance forbidding anyone to erect and use a steam engine within corporate limits without a permit from the mayor?
45. Is an ordinance valid which requires certain persons by name to construct local improvements on the streets in front of their lots?
46. (a) What say you of an ordinance assigning a different license rate to residents and non-residents for the same privilege? (b) One forbidding the renting of private property to lewd women? (c) One forbidding cattle running at large? (d) When one defends against an ordinance because it is unreasonable, and he is enjoying his constitutional right to a jury trial, who decides the case, the judge or the jury? (e) What unusual ordinances have been declared not unreasonable? Mention at least four. (f) What power over tipping has a municipal corporation in a license state?
47. What procedure may be used to enforce an ordinance?
48. Define distinctively an officer, an agent, and an employee in a municipality.

49. What municipal officers belong to the governmental class, and what to the municipal?
50. (a) If asked whether your neighbor Jones is eligible to a municipal office, say alderman, what will you read to enable you to answer? (b) How would you learn how he is chosen, and what are his duties?
51. Mayor Jones dies and his son, without election, assumes the office, and performs its functions unquestioned till the term expires. Is he mayor *de facto*?
52. Dobbs was inducted into the office of chief of police, at a salary of \$1,200. When the new fire engine came he was required as such chief to perform the duties of fire-chief also. When denied additional pay he sued for it. Decide the case.
53. (a) May the title of any municipal officer, actually serving, be challenged, and tested indirectly? Why? (b) May a municipal officer resign merely because he is piqued or dissatisfied? (c) And what results if his resignation is not accepted?
54. What authority have the state courts over purely municipal officers?
55. Are any municipal officers subject to removal? If so, what officers? By whom?
56. Is an officer personally liable on a municipal contract made by him as a municipal agent?
57. (a) Is he personally liable in a civil action for any tort committed in his official capacity? If so, when and why? (b) For what, if anything, is a municipal officer bound to reimburse the corporation?
58. Wherein do municipal contracts differ, if at all, from the contracts of private corporations or persons, in the rules that govern their making, performance and breach, and the consequences thereof?
59. (a) Define "*ultra vires*" and apply it with reference to the contracts of municipal corporations. (b) Give three illustrations of contracts by municipalities which the courts have declared void because *ultra vires*. (c) Suppose a municipality after actually making a contract beyond its lawful power, deliberately ratifies it and takes benefit under it. Does that estop the corporation from pleading

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ultra vires to an action for breach of the contract? (d) Under what condition will a contract only partially ultra vires be wholly void? And under what other condition may it be valid in part?

60. What may save from total loss a dealer who has sold and delivered to a municipality articles of value under a contract which is clearly ultra vires?
61. What have you to say of a plea of ultra vires made by a municipality to a contract for school supplies made with the city attorney, under which the city had received the articles bought?
- 62-63. Is the city liable on an oral contract for supplies which the charter requires to be bought by contract in writing?
64. (a) What is meant by the phrase "letting of contracts"? To what classes of contracts is it applicable? (b) And what are the fundamental rules in regard to such letting?
65. (a) Give four illustrations of municipal contracts which are declared illegal and void for other causes than ultra vires. (b) Are municipal contracts affected by general statutes forbidding contracts in general terms only? (c) Are they controlled by the general rules of the common law?
66. (a) May a municipal corporation by virtue of its authority as a governing agency annul its own contracts or repudiate them? (b) May the state legislature pass laws impairing the obligations of municipal contracts?
67. Under what conditions are the negotiable bonds of a municipal corporation open to legal or equitable defense in the hands of an innocent transferee for value, just as in the hands of the original holder?
68. Define and distinguish the two classes of municipal improvements.
69. (a) Describe the difference in the powers under which the two classes of municipal improvements may severally be made. (b) Point out particularly the distinctive features of local improvements which call forth extraordinary municipal power, that must be expressly granted.
70. What are the preliminary proceedings generally essential to the imposition of extraordinary municipal burdens for public improvements.

QUIZ QUESTIONS

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71. State the three essential conditions precedent for making a valid municipal contract for improvements.
72. (a) What is the rule of the common law about damages for improvements as stated in the famous Pittsburgh case? Relate the case. (b) What is the present state of the law on this subject? And how has the change been wrought?
73. Boal's lot in a special assessment district, being already low, is actually injured rather than benefited by the improvement. No provision is made by the law for such a case, and he is subjected to the usual frontage assessment. Must he pay it? If not, what is his remedy, and why?
74. What is the prevalent and logical doctrine with regard to the power of a municipality to make the special assessment a personal charge against the lot owners?
75. (a) What is the police power? (b) Where does it reside? (c) And what is its origin?
76. (a) Does the police power belong to a municipality? (b) If so, how does it obtain it? (c) Is it inherent in whole or in part?
77. What are the limitations, physical and otherwise, upon the municipal exercise of the police power?
78. (a) Give an illustration of the summary exercise of police power by a municipal corporation. (b) Suppose that some particular act is against not only the municipal welfare but also the peace and dignity of the state. Do the courts permit an enforcement of both state and municipal penalties therefor? Why?
79. What is the primary police function of a municipality, as of all other organs of civilization?
80. Has a municipality inherent power to preserve public health by any and all appropriate means?
81. (a) Next after the life and health of the community, what comes in the order of municipal importance? Is it, too, within the police power? (b) Give illustrations of the approved exercise of the police power to promote the public comfort by municipal corporations.
82. Illustrate the municipal exercise of the police power in a lawful way by instances affecting occupation, amusements.
- 83-84. Define a municipal market, and state how its proper

control may require the use of the police power by the municipality.

85. Define a street and state what it may include.
86. (a) Where resides the supreme power over streets, and why? And what is the consequence? (b) What power has a municipal corporation over its streets? And in case of conflict between it and the state, which prevails?
87. Define dedication and acceptance and show the effect of each, and of both together.
88. What is the primary use of a street, and how far may a municipality interfere therewith?
89. What rights in streets beyond those of the general public have abutting owners?
90. (a) What power over streets with reference to sewers has a municipality? (b) Is this an inherent power? (c) To what extent?
91. (a) May a city voluntarily acquire and own parks and squares? (b) May they be imposed upon it by the state? Relate the Detroit case.
92. (a) Has a city inherent power to buy, build and own necessary public buildings? (b) May the state impose this duty and expense upon the city? Relate the Philadelphia case.
93. What is the general doctrine of municipal liability for tort? State the reason for it.
94. (a) Podunk's policemen arrest and imprison Jones without warrant, and torture him to force confession of guilt of a burglary. Is Podunk liable to Jones in damages for this? Why? (b) Is Podunk liable to Jones for the burning of his house occasioned by its failure to provide a fire engine for the corporation? Why?
95. For what sort of municipal injury is the corporation liable?
96. What is the nature of a city's failure to keep its streets in proper repair?
97. For injury resulting to a traveler from neglect to keep its streets in repair is the city liable in your state? Why?
98. Suppose the traveler's injury results from municipal negligence properly to signal an obstruction placed in the street by a stranger. Is the city liable to the traveler therefor? Why?
99. (a) Whose is the duty to keep in proper repair the side-

- walk, the city or the abutting owner? (b) Podunk's ordinance requires every abutting owner to construct the sidewalk and keep it in repair. Is Podunk liable to an abutting owner for a broken arm caused by slipping on the ice on the sidewalk in front of his own lot?
100. Is there municipal liability for civil injury to a citizen upon the city's bridge or viaduct resulting from municipal negligence? Why?
 101. You suffer injury from a defective system of sewers in your city. Is the city liable to you therefor, supposing the injury result (a) from defective construction, (b) from the defective plan of sewer? Why?
 102. What is the doctrine of respondeat superior? Is it applicable to municipal corporations?
 103. Relate the Salt Lake City case decided in the U. S. Supreme Court. Does the doctrine of ultra vires apply to that case? Explain fully?
 104. For what purposes may a municipality incur indebtedness? And who shall determine the amount thereof?
 105. What are the limits beyond which a municipal corporation may not go in contracting indebtedness? How are they fixed?
 106. What does the commercial world understand by the term "municipal bonds"? What is their form and for what are they issued? (a) Has a municipality inherent power to borrow money on municipal credit? (b) Whence and how does such power come?
 107. Has the municipality inherent power to issue bonds? May it have implied power? From what?
 108. Distinguish municipal warrants from municipal bonds. Is express power essential to issue valid warrants? What is their lawful limit?
 109. (a) What is a municipal fund? (b) How is it created? (c) May it be diverted by municipal action? (d) What rights may creditors obtain in municipal funds? (e) May such funds be superior to legislative control? (f) When are they so, and how do they become so?
 110. What are embraced in the expenses of a municipality? Will the term properly include bonds and warrants?

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111. What is a budget, and what is its object? What good purpose does it serve in municipal administration?
112. (a) What is meant by the phrase "municipal claims"? (b) May they be sued on? (c) If so, when? (d) Describe appropriation in municipal administration. (e) What is its legal effect? (f) What rights do creditors obtain under it?
113. (a) Has a municipality the power of taxation? What are the nature and source of the power? (b) What control, if any, has the legislature over the power of municipal taxation? May it limit the rate of levy?
114. For what purposes may a municipality levy taxes?
115. (a) What power in the state or city ultimately decides whether a municipal tax is for a public purpose? (b) What became of the municipal levies made in Boston and Charleston (S. C.) to raise money to loan to lot owners to rebuild?
116. What have been judicially held to be public purposes? Name at least four of them.
117. (a) What is meant by the apportionment of taxes, and what rules are there for it? (b) You live in Podunk and own a house therein, and a lot just beyond corporate limits. You keep your notes, stocks and bonds in a safe deposit in the nearest city. Podunk levies a tax on your poll, your house, your lot, and your stocks and bonds. Will you pay it, or what will you do?
118. Podunk votes down a proposition to build a new school house. The legislature levies \$10,000 taxes, one half payable this year, the other half next, and appropriates it for a new municipal school building. Is this levy valid?
119. (a) What is the limitation of the municipal power to levy taxes? (b) What is the source of this municipal power of taxation, inherent, implied or expressed?
120. (a) Is it competent for the municipality to levy a license tax? May it levy such tax for any other purpose than the state dues? (b) You challenge the right of the corporate officer to collect any tax from you for anything, and a lawsuit ensues. He calls the mayor and clerk to testify that taxes were levied and orders given him to collect. What will you do?

QUIZ QUESTIONS

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121. Who assesses municipal taxes, and how? Who collects them, and how?
122. You have a judgment against Podunk for \$2,000 and the council has levied a special tax and appropriated it to your judgment. The corporation treasurer, while collecting the taxes, laughs at your call for money and informs you that he will pay this appropriation, as soon as collected, to Bulger for a chemical fire engine. What will you do about it?



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QUIZ QUESTIONS

LAW OF PUBLIC OFFICERS AND ELECTIONS

(The numbers refer to the numbered sections in the text.)

1. What is meant by the term "administrative law," and of what does it treat?
- 2-3. In distinguishing between an office and an employment what questions must be determined? Why is the distinction important?
4. State whether the right to hold office is a property right.
5. Under what authority are federal, state, and municipal officers elected? By what authority do they hold their respective offices, and under what supervision must they perform their duties?
6. Who are public officers? Give specific instances.
7. Into what three general classes are public officers divided in the modern law?
8. In what manner may incumbents properly occupy their respective offices?
- 9-10. What methods are pursued to bring before the elective body the names of the proposed candidates, and of which of the several methods do you approve?
11. To what extent have the several states power to determine who may vote for domestic officers?
12. Define and explain the provisions of what are known as restrictive laws.
13. What restrictions, if any, are imposed upon the states when prescribing qualifications of officers?
14. State the constitutional restrictions upon minority representation and cumulative voting.

15. Distinguish between majority and plurality in voting.
16. Who determines the form of the ballot, and the manner in which the ballot shall be cast?
17. A, being an illiterate, desires to cast his ballot; he has determined for whom to vote. Upon arriving at the polls, to whom should he apply for assistance to enable him to cast his ballot?
18. What are the duties of election commissioners?
19. The canvassing board refuses to perform its duties. What remedy may be invoked to compel it to do so?
20. To what extent may the legislature regulate the requirements for a valid election?
- 21-22. Compare the advantages and disadvantages of election and appointment of public officers.
23. Who may exercise the power of appointment and under what circumstances may such power be exercised?
24. The mayor of a city fails, within a reasonable time, to appoint a chief of police. May he be compelled to do so, and if so, by what remedy?
- 25-26. By what evidence should the appointee be able to establish his right to hold his office?
- 27-28. How may the title of one claiming to hold office be called into question and determined?
- 29-30. When and under what circumstances may vacancies in elective offices be filled by appointment?
31. Who may determine when a vacancy in an office exists?
- 32-33. A person is duly elected or appointed to an office. What further, if anything, is necessary for him to do before entering upon the duties of his office?
34. Burns, a citizen of the United States, is appointed minister plenipotentiary to France, goes to Paris with his family and remains there as such for a period of years, during which time a son is born to him. Would such son be eligible to the office of President of the United States?
35. Are there any qualifications touching the age of office holders, either elective or appointive? If so, state what they are.
36. What are the requirements as to citizenship when one

seeks an office, whether elective or appointive? Distinguish between residence and citizenship.

37. Is the privilege of voting a right or a license?
- 38-40. When the privilege of voting is granted, upon what is it based, and to what extent do age, sex, property, educational or religious qualifications affect the granting of it?
41. Under what circumstances may an officer, either elective or appointive, become disqualified by reason of his own acts, after taking office?
42. Under what circumstances may the legislature prescribe the necessary qualifications and duties of appointive or elective officers?
43. A is elected to the office of constable in the County of B; he qualifies and enters upon the duties of his office; soon thereafter it becomes apparent that he does not comprehend and is unable to read and write the English language. May he be dispossessed of office and the office declared vacant for these reasons?
- 44-45. McGuire is judge of the county court; during his incumbency he is convicted of the crime of grand larceny. Would this afford a sufficient ground for declaring his office vacant and placing another in his stead?
46. Under what circumstances does one become a de facto officer?
47. So long as one remains a de facto officer, what effect in law is given to his acts? Why?
48. What elements must exist in order to constitute one an officer de facto?
49. Wherein do the powers, rights and duties of an officer de facto differ from those of an officer de jure?
50. Upon what provisions is the compensation of officers based and how may they proceed to enforce payment?
51. What effect, if any, would the discontinuance of the office or lawful discharge of the officer have upon his right to recover compensation?
52. What is meant by impeachment and under what circumstances and by what authority may this power be exercised?
53. May officers assign their salaries? If so, to whom and upon what consideration?

54. What remedy has the assignee of the salary of an officer from whom such assignee desires to collect by process of law?
55. In the absence of constitutional provision, has a municipal government power to promise and pay to its officers money not earned, commonly known as pensions or awards?
56. To what authority should we apply to determine the powers of officers when they are not specifically set forth in the articles of municipal incorporation or defined by statute?
57. How is the matter of jurisdiction apportioned? What is meant by jurisdiction of the subject matter? Jurisdiction of the person named?
58. What will disqualify a judge from sitting in a particular case?
59. Which branch of the government ultimately exercises the power of finally passing upon the acts of the several other branches?
60. Where it is provided that whatever action is to be taken shall be taken by a board or committee, may such action be taken by a majority of members thereof individually, when not convened in meeting?
61. What is meant by the expression, "Everyone is presumed to know the law," and what application has it to persons dealing with public officials?
62. Distinguish between judicial and ministerial duties.
- 63-64. How may one determine whether the duties to be performed by an officer are judicial, ministerial, or discretionary?
65. A has certain property in the County of Cook and State of Illinois; his personal safety and that of his property are threatened by mob violence; he calls upon the sheriff for protection; this the sheriff fails to afford him. What remedy, if any, has A?
66. Distinguish between the liability which may attach to officers ministerial and officers judicial in the performance of their several duties.
67. In case a judge assumes to act where he has not jurisdiction of the subject matter, does he incur personal liability? If so, to whom, and what is the remedy?

68. (a) A court of limited jurisdiction determines a case not within its jurisdiction. Has the injured party any remedy other than that of appeal or review? (b) A court issued an injunction against A; A violated such injunction; and the court instituted proceedings against A for contempt; A then pleads that the court did not have jurisdiction of the subject matter. Is this defense available?
69. In cases where a judicial officer cannot be held liable to the party injured, though guilty of a breach of duty, who may call him to account?
70. Discuss and explain the distinction between impeachment and recall of judicial officers.
71. Define an administrative officer, and state under what circumstances he may become liable in an action at law for wrongful acts committed by him as such officer.
72. What presumption obtains with reference to the acts and doings of a quasi-judicial body?
73. To what extent will discretion, honesty, and fairness exercised by an officer protect him from liability?
74. Under what circumstances may a ministerial officer be guilty of malfeasance, misfeasance, and nonfeasance? Explain fully and state reasons.
75. (a) When will a writ of mandamus lie to compel an inferior officer to perform a specific duty imposed upon him by law? (b) Will a writ of mandamus ever lie to compel a superior officer, e. g., a judge of a court of general jurisdiction, to perform his duties?
76. State under what circumstances a superior officer may become liable for the tortious acts of those under his direction.
77. McGinty, clerk of a court of record, at the instance of Jones, knowingly makes a false entry on his records to the loss and damage of Robinson. What redress has Robinson?
78. To what extent, if at all, is a public officer personally liable upon contracts made by him in his official capacity?
79. Sheriff A, acting under a writ, fair upon its face, levies upon the property of B and disposes of the same at public vendue; the judgment having been obtained by fraud is

afterwards set aside upon motion of B. May B maintain an action against Sheriff A?

80. To what extent are members of legislative bodies personally liable, at law or in equity, to persons claiming to be injured by the enactments of such bodies?
81. (a) A has a claim against the state in which he lives for services rendered to such state; he brings an action against the state at common law. What defense, if any, ought the state to interpose? (b) Explain the doctrine of *respondeat superior* in so far as it applies to officials in public positions.
82. Jones is one of the fire marshals in the City of Chicago; in responding to a call he negligently runs upon and over Robinson; Robinson brings his action in tort against the city. May he recover?
83. An innkeeper receives a guest and affords him accommodations. The morning following the guest displays the symptoms of a contagious disease, which becomes known to the other guests of the inn, whereupon they seek other quarters. It develops that the guest had been exposed to contagion, had been examined by the health officer of the city in which the inn was located, and had been dismissed as safe. The innkeeper brings an action against the city health officer. May he maintain such an action?
84. Is a municipality liable for damages to an individual resulting solely from a mistake in the exercise of judgment on the part of one of its officers?
85. From your reading and consideration of the text and of the cases cited in support thereof, what do you determine to be the weight of authority with reference to the liability of municipal corporations for the tortious acts of their minor officials?
86. From the weight of authority do you find that any different rule has been applied in the federal courts from that which obtains in the state courts?
87. The legislative body proposes to pass an act which, it is claimed, is unconstitutional. May the person so claiming obtain judicial decision upon the constitutionality of this proposed act before it becomes a law?
88. To what extent will courts entertain proceedings to enjoin

the passing or enforcement of any particular law or ordinance?

89. State a case in which you would advise your client that he could maintain a bill to enjoin a municipality from the collection of taxes claimed by it to have been lawfully levied.
90. Explain the action of certiorari as applicable against public officers.
91. A sheriff having custody of a person refuses to release him upon proper evidence being presented that the person so in custody has given good and sufficient bail which has been accepted by the proper authority. What remedy has such person to obtain his release from custody?
92. (a) Under what circumstances will mandamus lie to compel the performance of acts purely judicial? (b) In general, what is the liability of the successor in office for the unlawful acts of his predecessor?
93. Define the writ of prohibition. State when, under what circumstances, and for what purposes it will be issued?
94. A justice of the peace is elected for a certain term of years and to serve until his successor is duly elected and qualified; at the expiration of his term of office no election is held; he still continues to administer his office. Will quo warranto lie to oust him?
95. A board of health consists of five members; one of them becomes insane, another dies. May the remaining three still exercise the functions of the board?
96. A is elected school trustee for a three-year term; the township, by vote, abolishes this office at the end of his second year. May A maintain an action to recover his salary for the remainder of his term?
97. Suppose an officer wrongfully neglects to perform the duties of his office to such an extent that the public suffers therefrom. What is the remedy?
98. Under what circumstances may an officer, having duly qualified and entered upon the duties of his office, become disqualified?
99. The President of the United States appoints Smith Secretary of the Interior; Congress concurs; Smith qualifies and enters upon the duties of his office; after some lapse

of time he becomes personally distasteful to the President who thereupon orders his removal from office and declares his office vacant. Is Smith bound to obey?

100. The mayor of a city appoints Jones fire marshal; the ordinance provides that a fire marshal shall hold his office for a term of two years; at the expiration of eighteen months the mayor arbitrarily orders Jones to quit his position and appoints another in his stead. Is Jones legally bound to step aside and allow such other to supersede him?
101. To whom or to what body, judicial or otherwise, is entrusted the duty of deciding upon the facts when it is sought to remove an officer for cause?
102. State whether it is within the power of those appointing an officer to suspend him, or whether they must declare his office vacant and appoint a new incumbent.
103. Where ought you to search to find the provisions governing the impeachment of public officers of high degree, as President, governor, etc.?
104. To what extent, if at all, do the provisions for recall of judges in force in several of the states, apply to the recall of other superior officers by referendum?
105. (a) Smith is duly elected secretary of state of the state of Illinois; he qualifies as such and enters upon the duties of his office; prior to the expiration of his term he desires to resign. How ought he to make his desire known and to whom? (b) May such resignation be shown by acts, or must it necessarily be expressed?
106. Who has authority to accept the resignation of a public officer, so as to determine his liability, upon his official bond or otherwise, for his acts as such officer, and in what way must acceptance be shown?

QUIZ QUESTIONS

PARLIAMENTARY LAW

(The numbers refer to the numbered sections in the text.)

1. What are the source and origin of parliamentary law?
2. What two kinds of assemblies are there and how do they differ as to the right of membership?
3. State the proper method of organizing deliberative bodies. To whom is control of the same entrusted?
4. A asserts that he has been elected a member of the board of county commissioners, and demands admission to their sessions. What credentials must he produce in order to establish his right?
5. A deliberative assembly announces that it will be governed with regard to the order of its proceeding by Roberts' Rules of Order. May it modify these rules at all?
6. (a) What is meant by a quorum? (b) Suppose that the provision of law by which the deliberative body acquires its powers, requires that a majority of all its members be present before it may transact business. May it act in the absence of such majority?
7. Jones, a director in a corporation, upon arriving at the meeting place of the directors, learns that the presiding officer has violated the rules prescribing the regular order of business, and has disposed of a matter in which Jones was interested, out of its turn. Has Jones any just cause of complaint?
8. In the absence of by-laws or other specific regulations, how is the will of the assembly to be ascertained?
9. Assume that the presiding officer of a deliberative body desires to make an argument upon one side or the other of a question. What ought he to do?

10. In choosing a clerk or recording officer what qualifications should be considered?
11. State in a general way the duty of the recording officer with reference to keeping a record of the proceedings.
12. One member of a deliberative assembly is addressing the chair. Under what circumstances may another member interrupt him?
13. Suppose a member of a deliberative body is expelled. What remedy, if any, has he to gain reinstatement?
14. A makes a motion, B seconds said motion. Upon its being inquired into, it is ascertained that B is not a duly qualified member of the body. Ought the chair to entertain A's motion?
15. To what extent, if at all, may the chairman of his own motion bring the consideration of new business before the assembly?
16. When a member desires to be heard in any matter how should he proceed and what ought the presiding officer to do in recognition of such proceedings?
17. Upon being recognized by the chair what should the member next do in order to bring the matter in which he is interested before the assembly?
18. Who may present petitions and in what way should they be called to the attention of those who are to pass upon them?
19. What is the necessity of, and the reason for, a second to a motion?
20. At what point in the proceedings may the propriety of a motion be questioned or its debate be entered upon?
21. How should the vote on a motion or resolution be taken and recorded?
22. How should the chairman proceed to bring the matter before the body for deliberation and determination?
23. Under what circumstances, if at all, is the presiding officer permitted to cast a ballot?
24. A motion is regularly before the house. What other motions, if any, may properly be entertained before proceeding to its consideration?
25. Name the usual subsidiary motions and state their several uses and purposes.

26. What is the effect of a motion properly made and carried to lay the principal motion or resolution on the table?
27. The principal motion is before the assembly; subsidiary motions have been made; a member desires a ruling on the original motion. What should he do?
28. When may a motion to postpone indefinitely be interposed and is such a motion ever debatable?
29. What is the object of a motion to postpone a matter in question to a definite time?
30. The chairman desires to submit the matter to a committee; there is no standing committee for such purpose. May he appoint a special committee without definite authority from the assembly?
31. By what two proceedings may defects in a motion or resolution be corrected?
32. An amendment to the main proposition is offered; an amendment to this amendment is offered. Ought the chairman to consider the latter before the former has been disposed of?
33. Name, define and classify privileged motions. Under what circumstances are such motions available?
34. Under what circumstances is a motion to adjourn proper, and when, if at all, is it open to debate?
35. Suppose a motion to adjourn to a special time and place is made. Is such motion debatable, and if so, in what particular?
36. Under what circumstances is a motion to take a recess privileged and when is it open to debate?
37. Into what two general classes may questions of privilege be divided and what is the order of preference between them?
38. Who decides whether a question suggested by a member is privileged or not?
39. A member of an assembly is discussing on the floor some matter extrinsic to the regular order of business; motion is made to take up instead the regular order of business. Should such motion be entertained?
40. Classify incidental motions; state their use and purpose.
41. A question is stated; a member desires to object to its consideration on the ground that decision thereon is outside the purposes of the assembly. May he do so, and if so, in what manner?

42. When may a member raise the question of order?
43. A appeals from the ruling of the chair. Who ultimately decides the appeal, and to what extent, if at all, may the chairman participate in the discussion thereof?
44. Under what circumstances may a member demand the reading of papers bearing upon the question in issue?
45. A member makes a motion and later on desires to withdraw it. How should he proceed and what should the chairman do?
46. A matter is proposed for determination contrary to some established rule of procedure. If it is otherwise a proper matter for consideration, how may this objection be overcome?
47. What incidental motions give an assembly complete control of its business?
48. State which incidental motions take precedence over the others.
49. What is meant by a vote to reconsider, and what matters may be taken up for discussion by virtue of such motion?
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LEADING ILLUSTRATIVE CASES LAW OF PUBLIC SERVICE COM- PANIES—ESPECIALLY COMMON CARRIERS

PART I

ESTABLISHMENT OF PUBLIC DUTY

CHAPTER I.

PUBLIC EMPLOYMENT.

Effect of Natural Monopoly.

HAUGEN v. ALBINA LIGHT AND WATER CO.

21 Ore. 411, 28 Pac. 244. 1891.

This is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook Street, and allowing him to connect a service-pipe therewith.

LORD, J. * * * It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the State, or the municipality acting under legislative authority. In such case,

how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It was not organized to lay pipes, but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And if the supply of a city or town with water, as VAN SYCKEL, J., said, is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head. We discover no error, and the judgment must be affirmed for the plaintiff, making the writ peremptory.

Difficulty Attending the Distribution.

**CINCINNATI, HAMILTON AND DAYTON RAILROAD CO.
v. VILLAGE OF BOWLING GREEN.**

57 Oh. St. 336, 49 N. E. 121. 1879.

This action was brought in the Court of Common Pleas of Wood county, by the village of Bowling Green, to recover of

the railroad company, plaintiff in error, a sum of money to reimburse the village for expenditures incurred by it in maintaining electric lights at certain places that by ordinance it had required the railroad company to maintain, and which the latter had neglected to do.

BRADBURY, J. * * * Did the ordinance unreasonably limit the right of the railroad company to contract on its own behalf, or unreasonably place it within the power, and subject it to extortion at the hands of the electric light and power company, of which it must procure the lights?

True, the railroad was required to adopt electricity as the means of illumination, and was confined to the kind of lamps and their attachment, then in use in said village. If the exclusive right to use within the village these lamps and attachments had been granted by the patentee to the Bowling Green Electric Light and Power Company, and if this company had an absolute power to fix the price that it could exact for the use of its light and lamps, then the contention of the railroad company would find strong support in reason and justice. It may be conceded, however, that the lamps and their attachments, as well as the system of lighting in use in the village of Bowling Green, were all protected by patents, and that the Bowling Green Electric Light and Power Co. had the exclusive right to their use within that village, and yet the power of extortion would not follow, necessarily.

The light and power company have acquired in the village rights that are in the nature of a monopoly. The use to which it has devoted its property is one in which the public have an interest, and it requires the use of the streets and alleys of the village to conduct and distribute electricity to its lamps for illuminating purposes; and, in addition to this, power to appropriate private property has been conferred on it. Both reason and authority deny to a corporation clothed with such rights and powers, and bearing such relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire to use it.

The Bowling Green Electric Light and Power Company was bound to serve all of its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted of others who

had used its lights. The village had authority to fix the rates to be charged by the company for lights. If the village authorities should fail to act in this respect, and the plaintiff in error and the power and light company could not agree upon a price, the former, by an appeal to the courts of the State, could compel the latter to furnish the lights at a reasonable price.

Therefore, the provision of the ordinance requiring the plaintiff in error to use the lamps and attachments then in use in the village was not unreasonable.

Scarcity of Advantageous Sites.

MUNN v. ILLINOIS.

94 U. S. 113. 1876.

WAITE, C. J., delivered the opinion of the court:

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved. * * *

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the

public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle. * * *

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. * * *

Legal Privileges Accompanying Public Employment.**GREEN v. WESTERN UNION TELEGRAPH CO.**

136 N. C. 489, 49 S. E. 165. 1904.

Action for mental anguish caused by failure to deliver in time a telegram asking that a child be met at a train. Demurrer overruled.

DOUGLASS, J. * * * A telegraph company is a quasi-public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession and freedom from individual liability; and possesses also in addition thereto, the extraordinary privileges which under our Constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. * * *

Limitation of Available Time.**STATE EX REL. GWYNN v. CITIZENS' TELEPHONE CO.**

61 S. C. 83, 39 S. E. 257. 1901.

Petition by J. B. Gwynn for mandamus against Citizens' Telephone Co., requiring it to place a telephone in his store and

in his residence. From order refusing the writ, petitioner appeals.

McIVER, C. J. * * * The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a quasi-common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed.

The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line.

Nor does the fact (if fact it be) that the relator had committed a breach of his previous contract with respondent, when he purchased Holland's market, in which an instrument of the

Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of his previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the mandamus prayed for should not issue under the circumstances of this case, to wit: that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above: that there does not appear to be any evidence in the "Case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with the relator's demand.

Economic Limitations Creating Public Employment.

THE INTER-OCEAN PUBLISHING CO. v. THE ASSOCIATED PRESS.

184 Ill. 438, 56 N. E. 822. 1900.

Bill in Equity brought to restrain the Associated Press from enforcing against the Inter-Ocean Publishing Company the by-law providing that no one receiving the service of this press association should take news service from any other bureau. Judgment for the complainant in the Supreme Court reversing decisions in the lower courts dismissing the bill for want of equity.

PHILLIPS, J. * * * The organization of such a method of gathering information and news from so wide an extent of

territory as is done by the appellee corporation, and the dissemination of that news, require the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them. * * *

CHAPTER II.

PUBLIC PROFESSION.

Solicitation of the Public.

INGATE v. CHRISTIE.

3 Car. & K. 61 (Eng.). 1850.

ASSUMPSIT.

The declaration stated, that the defendant agreed to carry 100 cases of figs from a wharf to a ship, and that by the negligence of the defendant's servants the figs were lost. Plea: non assumpsit.

It was proved that, on the 14th of February, 1850, the defendant was employed by the plaintiffs, who are merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames Street, to the "Magnet" steamer, which lay in the River Thames, and that as the figs were on board the lighter, which was proceeding with them to the "Magnet," the lighter was run down by the "Menai" steamer and the figs all lost. It was proved that the defendant had a counting-house with his name and the word "lighterman" on the doorposts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him, and that the defendant was a lighterman and not a wharfinger.

ALDERSON, B. Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, "lighterman" painted at his door, and he offers to carry for every one.

Characteristics of Public Employment.**ROBERTSON & CO. v. KENNEDY.**

2 Dana 430 (Ky.). 1834.

NICHOLAS, J. Robertson & Co. sued Kennedy, in case, for the loss of a hogshead of sugar, which he, as a common carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river, to their store in Brandenburg.

On the trial, plaintiffs introduced proof conducing to show that defendant had been in the habit of hauling for hire, in the town of Brandenburg, for every one who applied to him, with an ox team, driven by his slave; that he had undertaken to haul for plaintiffs the hogshead in question, and that, after defendant's slave had placed the hogshead on a slide, for the purpose of hauling it to plaintiff's store in Brandenburg, the slide and hogshead slipped into the river, whereby the sugar was spoiled. They then moved the court to instruct the jury, in substance, that if they believed this proof the defendant was responsible for the loss of the sugar, unless it had occurred from inevitable accident, or the act of God. This instruction the court refused to give; but instructed the jury that defendant was responsible, if the sugar was lost through negligence, or from want of reasonable care.

The law is as contended for by the plaintiffs. Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial. The law imposes upon a common carrier the responsibility of an insurer, which requires a safe delivery at all events, unless prevented by public enemies, or such inevitable accident as lightning, tempests and the like, which are usually termed the acts of God.

The court erred in refusing the second instruction asked by the plaintiffs.

Judgment reversed, with costs, and cause remanded with instructions for a new trial, and further proceedings consistent herewith.

Indications of Private Business.

ALLEN v. SACKRIDER.

37 N. Y. 341. 1867.

PARKER, J. (after stating the testimony). The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiff's property falls short of proof sufficient to show them common carriers.

A common carrier was defined, in *Gisbourn v. Hurst*, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods of all persons indifferently"; and in *Dwight v. Brewster*, 1 Pick. 50, to be, "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In *Orange Bank v. Brown*, 3 Wend. 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." (Story on Contracts, § 752, a.) The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out

to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wishes to employ him." (2 Pars. on Cont. [5th ed.] 166, note.)

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says: "The 'Creole' was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly, they were not common carriers; and the judgment should, therefore, be affirmed.

All the judges concurring.

Judgment affirmed.

Extent of Public Profession.

MEMPHIS NEWS PUBLISHING COMPANY v. SOUTHERN RAILWAY COMPANY ET AL.

110 Tenn. 684, 75 S. W. 941. 1903.

Defendant railway company contracted with defendant Commercial Publishing Company, agreeing to run a special early morning train, carrying only the newspapers of said publisher, in consideration of said publishing company guaranteeing to it certain revenue from the operation of the train. This train became one of its schedule trains and was advertised as such, and was controlled exclusively by the railway company, which received all the revenues derived from the operation of said train, both in the carrying of passengers and freight.

Complainant, publishing the Memphis Morning News, demanded of defendant railway company the right to ship as freight its packages of newspapers to its several agents at various stations along the line of railway where the train was scheduled to stop, and tendered the usual charges on the same; but said defendant refused to transport said newspapers, alleg-

ing as grounds of its refusal, the obligations of its contract with defendant Commercial Publishing Company.

BEARD, C. J. * * * One of the duties imposed upon a railroad as a common carrier is that it shall deal fairly and impartially with all who seek, as passengers or shippers of freight, to avail themselves of its service. Impressed, as it is, by its grant of franchises, with a trust to the public, this trust can only be discharged by extending equal facilities to each member constituting the public. It fails of its duty, therefore, when discriminating between individuals in like condition, it gives one an advantage in the carriage of his person or property which it refuses to another, and it follows that any contract made by it, by which one or more members of a class are fostered at the expense of or to the detriment of others of the same class, who demand like service, is unenforceable.

Granting that goods not dangerous in their nature and not unfit for shipment are offered at a proper place and time, and that the cost of carriage is tendered, and the railroad has facilities for shipment, then it must accept and transport them. In doing this it can show no favor, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded. *Hutchinson on Carr.*, sec. 297.

These general principles are conceded by the defendants to be sound, but it is insisted they do not control the present case. It is admitted—or it is true, whether admitted or not—that the railway company, as to the train in question, was a common carrier of passengers and their baggage, and of mail and express; but it is contended that it was, by reason of its contract with the Commercial Publishing Company, a private carrier of newspapers, and therefore was under no obligations to admit the newspapers of the complainant on its train.

It is true “a common carrier may become a private carrier or bailee for hire, when as a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry.” *Hutchinson on Carr.*, sec. 44. For example, “if a carrier of produce, running a truck boat, should be requested to carry a keg of silver or a load of furniture, he

might justly refuse to receive such freight, except by such an agreement as he might choose to make. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." * * *

Affirmed.

Profession Limited to Facilities Devoted.

BROWNE v. BRANDT.

(1902) 1 K. B. 696 (Eng.).

LORD ALVERSTONE, C. J. The plaintiff in this case contends that the defendant has broken his common law duty as an innkeeper to provide accommodation for travelers, and that this action can be maintained if the defendant had a room at the inn in which the plaintiff could have passed the night. The county court judge has found that the defendant's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were two rooms available for the accommodation of the plaintiff, and that that accommodation was refused. I do not think the question whether the plaintiff demanded to take the one sitting-room was submitted to the county court judge, but I do not wish to decide this case on narrow grounds; we must assume that there was some place in the house where the defendant might have permitted the plaintiff to stay for the night. I think that we should be straining the common law liability of an innkeeper if we were to hold that the plaintiff has a good cause of action. The true view is, in my opinion, that an innkeeper may not pick and choose his guests; he must give the accommodation he has to persons who come to the inn as travelers for rest and refreshment. I cannot think that the authorities to which we have been referred show that where an innkeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests he is under a legal obligation to receive and shelter as many people as can be put into the rooms without overcrowding. I think a person

who comes to the inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full, and I think that the landlord has no obligation to receive him. The landlord must act reasonably; he must not captiously or unreasonably refuse to receive persons when he has proper accommodation for them. Here the county court judge has found, in effect, that the defendant did act reasonably. For these reasons I am of opinion that the appeal must fail.

Obligation of Community Service.

CROUCH v. ARNETT.

71 Kans. 49, 79 Pac. 1086. 1905.

WILLIAM R. SMITH, J. This was an action in mandamus, brought by plaintiff in error in the district court to compel the firm of Arnett & Hobart, doing business as the Iola Telephone Company, to replace in his residence a telephone instrument which, it is alleged, was arbitrarily removed therefrom by the company.

Testimony introduced on behalf of the telephone company tended to show that telephones were installed in manufactories outside of the city—cement plants and brick-works—but that none of them was in the vicinity of Mr. Crouch's residence, the nearest being about half a mile. The zinc smelter adjoining the city to the northwest, the ice plant, a laundry, the water-works company and the pest-house west of the city limits were also supplied with telephones. Instruments were also furnished at the residences of four persons outside of the corporate limits of Iola, but these persons either furnished or paid for their own lines and poles. * * *

It may be conceded that defendants below, by devoting their property to public employment, and by putting it in the service of the public, thereby subjected it to the regulation of the legislature and control of courts to the same extent as other common carriers are controlled. We also agree with counsel that such companies cannot lawfully discriminate between subscribers of the same class, and that a company or partnership doing a general telephone business in a city must treat impartially all persons whom they undertake to serve. Also, when doing a general business outside a city, all patrons in the vicinity must be dealt

with impartially. The question of fact tried and considered by the court below was whether the telephone company was doing a general business outside of Iola and in the vicinity thereof. The general finding of the trial court determined the question in the negative, and that the limits of the company's general business outside the city did not embrace the plaintiff's residence. While the company was serving several manufactories beyond the city limits, they were not in the class with the plaintiff, and the owners of residences outside the city who had telephones were supplied at their own expense or paid for the poles and wires used to connect them with the exchange.

If Mr. Crouch had resided in the city his rights would have been clear. Being outside, a question of fact was presented whether in removing his instrument a discrimination was practiced on him—a right infringed which he enjoyed in common with others situated similarly. A telephone company operating wholly within the corporate limits of a city could not be compelled to supply instruments to residents beyond the boundaries of the town and make connections therewith. In this instance it did serve patrons outside of Iola, but the disputed question was whether Mr. Crouch, by reason of proximity and other conditions, was entitled to equal rights with them. This was to be determined from the testimony of witnesses and was peculiarly within the province of the trial court. That there was some evidence to sustain the judgment of the court below cannot be denied.

Withdrawal of the Profession.

WELD v. GAS & ELECTRIC LIGHT COMMISSIONERS.

197 Mass. 556, 84 N. E. 101. 1908.

Petitions by Charles G. Weld for certiorari against the board of gas and electric light commissioners, to review a decision of the board, and for mandamus against the Edison Electric Illuminating Company of Boston. Cases reported to the full court. Petitions dismissed.

It appeared that the petitioner, the owner of a house on Bay State Road in Boston, had formerly been supplied with electricity by the respondent, Edison Illuminating Company of Boston, but in the year 1902 an arrangement was made between the

respondent and a Brookline company by which the conduits and business of the Boston company on the westerly side of a line fixed were taken over by the Brookline company, and thereafter the petitioner was furnished current by the Brookline company, as his house lay to the west of the line.

KNOWLTON, C. J. The petitioner is seeking the enforcement of an alleged public right. His private interest is not independent of the rights of the public, but he claims only through the public, and as one of the citizens who are to be served by the respondent. See *Brewster v. Sherman* (Mass.), 80 N. E. 821. The facts show that he has suffered nothing in the sufficiency or quality of the service, or the price charged for it. So far as appears he is not likely to suffer in the future. Indeed, the statutes above referred to are intended to give him perfect protection.

We come, therefore, to the question whether, under our laws, an electric light or gas company, having a franchise covering a city or town in which another company has a like franchise, cannot, in conducting its business, if the public interest is not thereby affected, arrange with the other company to extend its lines into one part of the territory that is being newly developed, and leave the other company to extend its lines into another part of the territory, so that neither company will duplicate lines in streets where the other is serving the public. It seems to us that, under such conditions, this is a detail of administration which is not in violation of law. In other words, we think that a corporation making such an arrangement is not subject to prosecution under a writ of mandamus, for a failure properly to exercise its corporate franchise. We are not called upon to determine in this case whether such an arrangement could be availed of as a justification, if, unexpectedly, it should turn out that the public interest was injuriously affected. We do not suggest that a corporation can relieve itself of the performance of its duties to the public under its franchise; but only that details of administration, not inconsistent with the legislative policy of the commonwealth, may be left to the corporation, so long as adequate provision is made for the public. We go no further than to say that, under conditions like the present, the public has no grievance which the court will recognize. * * *

CHAPTER III.

PUBLIC DUTY.

Character of the Obligation.

BRETHERTON v. WOOD.

3 Brod. & Bing. 54 (Eng.). 1821.

Action by a passenger who has sustained injuries against the proprietors of a coach line jointly. Judgment sustained.

DALLAS, C. J. * * * This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it. It appears, by the different books of entries (a), that this form of action is of very ancient use.

Nor is it material, whether redress might or might not have been had in an action of assumpsit; that must depend on circumstances of which this Court has no knowledge, but, whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers. * * *

Real Party in Interest.

FLEMING v. MONTGOMERY LIGHT CO.

100 Ala. 657, 13 So. 618. 1892.

COLEMAN, J. * * * Stripped of the statement of facts necessary to present the complainant's case in an intelligible

form, the one question raised is, whether the assumption to supply the inhabitants of the city of Montgomery with gas, imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas, for inhabitants who do not use or consume gas, but who desire to be supplied "with meters and connections with the defendant's gas pipes so that in case an accident, which is apt to occur, should happen, they could use the gas.

A statement of the proposition suggests its answer. There can be no difference in principle between the case stated and the one in the bill, in which it is shown that at one time complainant used gas for lights, but at the time of filing the bill, and previous thereto, complainant used in his building electric lights furnished by a different company, or corporation, and was not a patron of defendant company, and the injunction was to make provision "to use gas" "in case an accident should happen to the electric lights in use by orator."

Plaintiff's contention is, that although he has made other arrangements with a different company for light, yet it is the duty of respondent to keep on hand gas and electricity with proper meters and connections and electric burners "in case of an accident" to the company which has contracted to supply him, and that too without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract between the city and respondent, expressed or implied. There is no equality or equity in such a proposition. It is hardly necessary to cite authorities, but we refer to the following: *Williams v. Mutual Gas Co.*, 50 Amer. Rep. 266, 52 Mich. 499.

There is no error in the record.

Peculiar Rights of Occupiers.

STATE EX REL. MILSTEAD v. BUTTE CITY WATER COMPANY.

18 Mont. 199, 44 Pac. 966. 1896.

HUNT, J. The appellant is a water company, engaged in supplying the inhabitants of the city of Butte with water, under its franchise. The city gave the corporation the right to lay its

mains in its streets and alleys. The company, on the other hand, is required to supply the inhabitants of the city of Butte with water for general use, at prices specified in the franchise granted. The relator is an inhabitant of Butte, occupying premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water upon the ground that, "by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners?" We say not. * * *

Certainly, the company may make reasonable rules and regulations. Doubtless it may require payments in advance for a reasonable length of time. It may, within reasonable limitations, cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times, or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house in need of water for general purposes.

Whether the owner has made a contract with the corporation to hold himself personally liable or not, or whether he has signed any paper agreeing to subject his property to a lien for water rents, we will not discuss in this case. The water company in no case, however, can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and, if it has adopted a by-law that is in conflict with its franchise, which may be termed its constitution, or is unreasonable or oppressive, the subordinate rule or by-law will be set aside. (Thompson on Corp. § 1010 *et seq.*)

This relator was entitled to water, and to a receipt for his payment, issued directly to him, and to have the amount of his payment credited to him alone, and the by-law pleaded by the company is, as to him, clearly unreasonable; and it is immaterial to his rights whether the owner had any agreement with the company or not, or whether, as tenant, he knew of the existence of any such agreement. The duty of the company,

under its franchise, and undertaken to be fulfilled, must be performed. The order appealed from is affirmed.

Affirmed.

Furnishing of Incidental Services.

MONTANA UNION RY. CO. v. LANGLOIS.

9 Mont. 419, 24 Pac. 209. 1890.

HARWOOD, J. The whole question involved in this controversy is compassed by the proposition, on the part of the plaintiff, "that it is the owner of said grounds, depot buildings, and platform, and that it may regulate the use of said platform as it desires, providing the traveling public is not inconvenienced; that it may, if it desires, engage in carrying passengers in hacks to and from its trains; that, if it was so engaged, it would have the right to its own property for such purpose; that, if it has such rights, it can as well employ Lovell Brothers with hacks to do such service as to own the hacks; that, if the plaintiff has the right to its platform, it has the right to sell that right to Lovells for a valuable consideration," and should be protected in the exercise and benefits of these rights. These propositions are controverted by defendants in so far as they affirm the right of the plaintiff to grant exclusive use of a portion of said platform to one party to approach and occupy the same, to convey passengers thereto and receive passengers therefrom, and exclude all others from so doing. * * * We do not find it consonant with reason, based upon those general propositions, to draw the conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to some place beyond, and there introduce them to one favored party, saying: "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform without delay or inconvenience, provided you will engage this particular party, and pay his demands; otherwise, you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage." All this

the railroad does, not for a benefit to the passengers, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad. If the railroad company set bounds beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others for employment, this would be an entirely different proposition.

The company does not undertake to protect the passengers from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this. * * * The passenger has purchased, or proposes to purchase, from the common carrier, transportation, and he must come to the station to receive such transportation, and on arriving at his destination he must depart from the station. The right to come to the station, and depart therefrom, under reasonable regulations which apply alike to all passengers without special conditions, is incidental to the main contract; while the supply of refreshments or newspapers, or the cultivation of flowers, at the station grounds, has, as we conceive, no appropriate connection with the engagements of the passenger and the common carrier.

Upon the grounds of sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of the Constitution, we believe the order of the court below ought to be affirmed; and it is so ordered.

Obligations Toward Dependent Services.

THE EXPRESS CASES.

117 U. S. 1, 6 Sup. Ct. 542. 1886.

WAITE, C. J., delivered the opinion of the court:

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. * * * [Individual cases appealed are here outlined.]

The exact question, then, is whether these express companies

can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freight when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them. * * *

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement.

Rights of Connecting Services.**SEASONGOOD v. TENNESSEE & OHIO TRANSPORTATION COMPANY.**

21 Ky. Law Rep. 1142, 54 S. W. 193. 1899.

GUFFY, J. The principal grounds relied on by appellants for a reversal are as to the instructions given and refused. It will be seen from the pleadings (and the testimony conduces to prove the same) that one McGrew was the owner of a warehouse at the mouth of Hurricane Creek, which was the only point at which the goods were delivered to and from steamboats in that immediate vicinity, and that it was the custom of appellee, as well as other boats, to receive freight from said warehouse, and that McGrew was furnished blank bills of lading, and collected freight bills. The collection, however, was done at the cost of the debtors. He was also employed by appellee to carry United States mail from the steamboat landing to the post office at Tolou. It appears from the testimony that on a certain evening appellee's boat landed at the landing aforesaid, and that the clerk of the boat asked McGrew what he had, and McGrew replied that he had "some chickens and eggs for Evansville, and a box for Cincinnati, and do you want them?" The clerk replied in substance, that he would take the chickens and eggs, but would not take the box; that appellee had an arrangement with another company that carried freight between New Orleans and Cincinnati not to take freight to any point beyond Evansville, and that the other company would not take freight within the boundary between Evansville and Cairo or Paducah; and it further appears that the goods were stolen the same night that appellee refused to take them. It is the contention of the appellee that it was not required by law to accept the box tendered, for the reason, as now relied on, that it could not be required to receive freight destined to a point beyond the end of its own line, which it appears in this case was Evansville, Ind. It is true that the appellee was not bound to undertake to deliver the box to the consignee at Cincinnati, but it was its duty to accept the box if tendered to it as a common carrier; for it was then its duty to carry the same to the end of its line, and there deliver, or offer to deliver, the

box to some common carrier engaged in such business, to be by it forwarded or carried to Cincinnati. It is clear that the agreement between appellee and the other company did not furnish any excuse for its failure to receive the goods. Such an agreement is illegal and not enforceable even between parties thereto. Much less can it excuse a party for refusing to discharge its duty as a common carrier as to the third party. *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.

Arrangements for Through Service.

**SOUTHERN PACIFIC RY. COMPANY v. INTERSTATE
COMMERCE COMMISSION.**

200 U. S. 536, 26 Sup. Ct. 330. 1905.

These are appeals from orders or decrees of the Circuit Court of the United States for the Southern District of California, in proceedings wherein the court affirmed, and ordered to be enforced, the determination of the Interstate Commerce Commission, relating to the above named railroad companies, directing them to desist from maintaining or enforcing a rule adopted by them and pertaining to shippers of oranges and other citrus fruits in Southern California, whereby those shippers were denied their alleged right of designating the routes for the transportation of their property from California to the eastern markets, under a tariff of through rates, as mentioned in the orders or decrees.

PECKHAM, J. * * * It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads. It is also undoubted

that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. *Atchison, &c., R. R. Co. v. Denver, &c., R. R. Co.*, 110 U. S. 667; *Louisville & Nashville R. R. Co. v. West Coast Naval Stores, &c., Co.*, 198 U. S. 483. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon, at least so long as they are reasonable and do not otherwise violate the law. In this case the initial carrier guarantees the through rate, but only on condition that it has the routing. It was stated by the late Mr. Justice Jackson, of this court, when Circuit Judge, in the case of *Texas, &c., R. R. Co. v. Interstate Commerce Commission*, 43 Fed. Rep. 37, as follows: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rate so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." This statement was approved by this court in *Cincinnati, &c., R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197. Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the Commerce Act which forbids the agreement with such condition therein as to routing. It is said that the sixth section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so.

CHAPTER IV.

CONDITIONS PRECEDENT.

Service Demanded at Proper Time.

FRAZIER & COOPER v. KANSAS CITY, ST. JOSEPH &
COUNCIL BLUFFS RAILWAY COMPANY.

48 Iowa 571. 1878.

DAY, J. (after reciting the special findings of the jury). From these special findings it appears that the plaintiffs came to Watson on the same train on which they expected to ship their hogs. The hogs to be shipped were not in the yards or on the depot grounds of the defendant when the train arrived at Watson, but were in a private yard in no way controlled or used by defendant. They had not been given into the control of any authorized agent of defendant. Defendant had not been notified to what particular station the hogs were to be shipped. Cars were placed at the yards of defendant, the night previous, in a suitable condition to be loaded, and they could have been loaded without the aid of a locomotive. Under such circumstances the plaintiffs had no right to demand or expect that the defendant's train should delay at the station until the hogs should be driven into the defendant's stock yards, loaded, way-bills made out, contract of shipment signed, and the cars placed in the train. If such delay could be demanded at one station, it could be demanded at every station on defendant's road. Both humanity and interest require that stock trains shall go forward with all reasonable dispatch.

The plaintiffs should have left some one at Watson in charge of their hogs, and had them loaded and ready for shipment when the train arrived. Each train must be moved with reference to all the other trains on the road. A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road, and even result in accidents, destructive of property and life. No person desiring to become a passen-

ger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yard, load four cars, count them, have way-bill made out, shipping contract signed, and the cars placed in the train? But plaintiffs say the yards of defendant were not in suitable condition, and hence they were not required to have their hogs in defendant's yards. The special findings show the yards of defendant were not in suitable condition for keeping plaintiff's stock, not being supplied with water. The special findings further show that the yards of defendant were in a suitable condition from which to load hogs. There is nothing shown to excuse plaintiffs from driving their hogs to defendant's yards, and having them loaded in time for the train.
* * *

Judgment for defendant affirmed.

Service Demanded at Proper Place.

GEORGIA SOUTHERN RAILWAY CO. v. MARSHMAN.

121 Ga. 235. 1904.

COBB, J. * * * When the plaintiff came to this place with the cottonseed, and notified the master of trains that no cars were there, and was instructed by him to continue to haul the seed, this was in effect an agreement to receive the seed alongside the track to await cars that would be sent there to receive them. A railroad company is not generally bound to receive freight except at its stations; but it may by custom bind itself to receive it at other points, and certainly it may do this by express contract. See *Fleming v. Hammond*, 19 Ga. 145. Parties having freight to be transported by rail cannot make a good delivery to the railway company by simply depositing the goods along the line anywhere and everywhere. *Central R. Co. v. Hines*, 19 Ga. 209. But where by agreement freight is deposited at a given point on the line of railway for the purpose of immediate transportation, there seems to be no good reason why such deposit should not constitute delivery to the carrier, whose liability would commence from the time the goods were deposited at the place agreed on. See *Wilson v. Railway*

Co., 82 Ga. 388 *et seq.*; Southern Express Company v. Newby, 36 Ga. 635. There was no error in overruling the motion for a nonsuit.

Application in Proper Form.

WESTERN UNION TELEGRAPH CO. v. DOZIER.

67 Miss. 288, 37 So. 325. 1889.

CAMPBELL, J., delivered the opinion of the court:

The verdict is contrary to the law and evidence, and should have been set aside. There is no warrant in the evidence, in any view of the law, for a recovery of any actual damage, for none is shown, it not appearing that Dr. Dozier sustained any by reason of the non-receipt of a message requesting his services. The truth appears to be that no message was sent to Dr. Dozier, but that, an ineffectual effort having been made to get Dr. Walker at Nicholson, and Dr. Watkins at Hattiesburg, the operator at Poplarville inquired of the operator at Hattiesburg if Dr. Dozier was in the town and was informed in reply that he had removed to Gulf-Port, and this being supposed to be true, no message was sent to Dr. Dozier. It is certain that no message to him was charged for or paid for, and therefore nothing was received by the company on this account. It appears that the operator, Mr. Atkins, was in full sympathy with those trying to procure a physician, and at his own instance, and free of cost to them, wired to Ellisville for the purpose of getting a physician known to him, who lived there, and this suggests the improbability that he should have failed to transmit any message delivered to him to be sent to Dr. Dozier.

The only messages actually written for transmission were to Dr. Walker at Nicholson, and to Dr. Watkins at Hattiesburg, and they were transmitted. If it be true that Stewart and Flanagan or either *told* the operator to wire Dr. Dozier, the question is, whether that was the delivery of a message, within the meaning of the law, for the non-transmission and delivery of which liability would be incurred by the company. In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we are not willing to sanction the proposition that failure to transmit such a mes-

sage is a ground for recovery against the company, either by statute or common law. It is common knowledge that messages are required to be written, and upon the blanks of the company, and it would be hazardous to pursue any other course. The very expression as to a message delivered to be sent, carries with it the idea of a written or printed message, and it would seem, that for one to *talk to the operator* as to the message he desired to send could not, in view of the course of business of telegraph companies, impose any liability on such company.

Reversed and remanded.

Reasonable Conditions May Be Imposed.

**SNELL v. CLINTON ELECTRIC LIGHT, HEAT AND
POWER COMPANY.**

196 Ill. 626, 63 N. E. 1082. 1902.

CARTER, J., delivered the opinion of the court:

* * * The trial court evidently held that the law applicable to the facts as found by the jury justified the awarding of the writ, for it refused to hold the proposition of law submitted on that question by appellee, while the Appellate Court was of the contrary opinion, for it made no finding of facts different from those found by the jury and the court below. The only question here is, therefore, whether or not, upon the evidence as found, the appellee made an unjust discrimination against appellant in charging him for a transformer in addition to the regular rates for electric lighting. * * * A transformer or converter is described by counsel as a coil of copper wire contained in a sheet-iron box, and is usually placed on a pole outside of the building. Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the wire leading to the house for house use. In this case the voltage would have been reduced from one thousand volts to fifty or a hundred volts. It appears that without the use of a converter the effect of turning this large voltage into a house would be to burn up the wires, and in the formation of short circuits there would be a great danger of fire, and that the object of the converter is the protection of the house. It is a necessary appliance for the safe lighting of houses. The

appellee had been in the habit of furnishing transformers, as needed, without any extra charge, for all houses which were wired for electricity by it, but claimed the right to charge for transformers in cases where it did not do the wiring, as it made no profit on the wiring in such cases. The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers and dynamo used in generating it. It is entirely immaterial who does the wiring of the house—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes—just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them.

The jury found that the appellee had not demanded extra pay for the use of a transformer from anyone else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. * * *

Prepayment a Universal Condition.

DICKERMAN v. ST. PAUL UNION DEPOT COMPANY.

44 Minn. 433, 46 N. W. 907. 1890.

GILFILLAN, C. J. No claim is made, and none could well be made against the reasonableness of the rules of the defendant requiring persons passing through the gates for the purpose of taking trains to exhibit their tickets to the gate-keeper and have them punched by him, and providing that no passenger shall be allowed to pass out of any gate after the train indicated by his ticket has started, or to board any train while in motion. Such or similar rules would seem absolutely necessary to preserve to the defendant control of its grounds, and to enable it to receive and discharge passengers with order, and to the safety, comfort, and convenience of the passengers. All persons having notice of such rules, and a reasonable opportunity to comply with them, are bound to observe them in order to have a right to pass through the gates or to take a train at

defendant's depot; and the defendant has a right to enforce such rules, and to prevent their violation, and to use such force as may be reasonably necessary to that end. If in no such case it may use force, then the right to enforce the rules and prevent their violation is but a barren right. * * *

Order affirmed.

Waiver of Prepayment Possible.

FELL v. KNIGHT.

8 M. & W. 269, 10 L. J. Ex. 277 (Eng.). 1841.

LORD ABINGER, C. B. I am of opinion that the plea is sufficient. I do not think a landlord is bound to provide for his guest the precise room the latter may select. Where the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle-light in a bedroom, provided he offers him another proper room for the purpose? The plea shows, that the landlord did everything that was reasonable. The short question is, is a landlord bound to comply with the caprice of his guests, or is he justified in saying, You shall not stay in a room in this way, and under these circumstances? I think he is not bound to do so. All that the law requires of him is, to find for his guests reasonable and proper accommodation; if he does that, he does all that is requisite. I am also inclined to think, notwithstanding the case which has been cited of *Rex v. Jones*, that the declaration is bad for want of an allegation of a tender of the amount to which the inn-keeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was ready to pay; he should state further that he was willing and offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows, so that no tender can be made; but I rather think those facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment of my Brother Coleridge, in the case cited: but it is not necessary to decide that point in the present case. This rule must be discharged.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

Reasonable Unit of Service.**HARBISON v. KNOXVILLE WATER CO.**

53 S. W. Rep. 993 (Tenn.). 1899.

WILSON, J. * * * A review of these and other authorities shows, we think, that the regulation of the defendant company requiring a prepayment of a quarter's rent for a water supply for domestic purposes is reasonable. We are not dealing with a case where the residence of the consumer is metered, and the exact quantity used by him can be measured. In such case the party pays for the water actually consumed by him, at the scale of prices fixed by the company, assuming its charges to be reasonable. In the case at bar the complainant gets his water from a hydrant in his yard, connected with the service pipe of the company, and the rule of the company fixes the quarter rent. Paying this rent, he is limited to the consumption of no definite quantity of water. The only limitation upon his use of it, so far as we gather from the record, is an implied one, that he must not waste it; and, if he does waste it, the company, under the authorities cited, can cut off the supply. But, in a controversy over this, the courts, we take it, are the tribunals to ultimately settle it, and not the company. The rule or requirement of the company that the party taking and paying for water for domestic purposes only must put his hydrant appliances in condition for such use only, and not have it in a condition to use water through and from them for sprinkling purposes, unless he pays a reasonable rental for the use of the latter purpose, is, we think, reasonable, and one that the company can enforce. Such a regulation for the sale of its water furnished through hydrants, where the quantity used cannot be or is not measured, is essential to protect the rights and safety of the company, and may be necessary to enable it to meet its obligations to the public, and its duty to furnish water to all inhabitants of the city alike and without discrimination. In determining the reasonableness or unreasonableness of a rule adopted by a water company chartered to supply a city and its people with water, we must necessarily take into consideration its relation to the city, and its compacted population, and the various elements composing such a population.

Prepayment of Arrearages Demanded.**THE PEOPLE v. MANHATTAN GAS LIGHT CO.**

45 Barb. 136 (N. Y.). 1865.

Appeal from an order made at a special term, denying an application for a mandamus commanding the defendants to supply the plaintiff with gas, at his house, No. 121 West Sixteenth Street, New York.

By the court, **INGRAHAM, P. J.** I think there can be no doubt about the authority of this court to direct the respondents to furnish gas to persons who, under the provisions of their charter have a right to receive it and who offer to comply with the general conditions on which the company supply others.

They possess, by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left then to inquire whether the relator was in a condition to demand from the company this supply. It appears by the papers used on the motion that the relator commenced taking gas in 1858, at No. 61 in Seventh Avenue, and was supplied with gas by the company, until 28th of December, 1861. That he paid for the gas so received up to 19th of August, 1861, and that for gas furnished after that date he has not paid. It also appears that in January, 1865, the respondent sued the relator and obtained a judgment against him for the amount due therefor, which still remains unpaid. In May, 1864, the relator applied to the company for gas at 121 West Sixteenth Street, which was furnished to him by the company, without objection on account of the former indebtedness, until 9th of February, 1865, when the company shut off the supply of gas and refused to furnish any more. It also appears that the relator, in answer to a claim for payment of this indebtedness, represents himself as insolvent and unable to pay the judgment.

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application. It would be unreasonable to suppose that in every instance they could

ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency and his inability to pay for gas furnished previously.

The attempted denial of liability for this bill, by the relator, will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside. So long as that remains in force it is conclusive against him.

The order appealed from should be affirmed, with \$10 costs.

PART II
CONDUCT OF PUBLIC SERVICE
CHAPTER V.

COMMENCEMENT OF THE SERVICE.

Acceptance as a Common Carrier.

SHAW v. NORTHERN PACIFIC RAILROAD.

40 Minn. 144. 1889.

Appeal by defendant from an order of the district court for Ramsey county, Simons, J., presiding, refusing a new trial.

DICKINSON, J. There was evidence justifying the jury in finding that, when the plaintiff was about to take passage upon a train of the defendant at Miles City, he delivered to it, for immediate transportation, his proper personal baggage, for the loss of which the action is brought; but that he then indicated for the convenience of the defendant, and not for his own purposes, that he did not care whether or not it was forwarded by the next train, which was soon to pass that station, as it would be five or six days before he would reach his destination. In other words, there was evidence, proper for the consideration of the jury, that the baggage was delivered to the carrier, and by it received, merely for transportation in the usual course of business, and not for storage. The liability of a common carrier, therefore, attached at the time of the delivery. *Lawrence v. Winona & St. Peter R. Co.*, 15 Minn. 313 (390); *Moses v. Boston & Maine R. Co.*, 24 N. H. 71 (55 Am. Dec. 222); *Barron v. Eldredge*, 100 Mass. 455; *Clarke v. Needles*, 25 Pa. St. 338. The baggage was not sent by the next train, but was put in the defendant's baggage-room, where it was destroyed by the burning of the building on the following day.

Delivery to the Carrier.**GROSVENOR v. NEW YORK CENTRAL RAILROAD.**

39 N. Y. 34. 1868.

MILLER, J. * * * The accident would not have happened had the cutter been placed beyond the reach of passing trains. It was not enough that the agent was notified, to make out a valid acceptance and delivery. The place of delivery was important, and it was equally essential that due care should be exercised. Suppose the servant had left the cutter on the track of the railroad, and notified the agent, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises, no surrender of the property into the possession of the agent. Until it was actually delivered, the agent was under no obligation to take charge of the property, even if notified. It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and in leaving it in an exposed condition, which caused its destruction; and, having failed to establish this material part of his case, should have been nonsuited. As a new trial must be granted for the error stated, it is not important to examine the other questions raised and discussed.

Acceptance as a Passenger.**BRIEN v. BENNETT.**

8 C. & P. 724 (Eng.). 1839.

Case for negligently injuring a passenger. Plea 3d, that the plaintiff was not a passenger.

It appeared that the defendant's omnibus was passing on its journey when the plaintiff, who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him up, and that upon his doing so the driver pulled up, and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver, supposing that the plaintiff

had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

LORD ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff.—Damages, £5.

Basis of the Undertaking.

TOLEDO, WABASH AND WESTERN RAILWAY CO. v. BROOKS.

81 Ill. 245. 1876.

WALKER, J. * * * It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employees of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate the rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit. In this case the evidence tends strongly to show that both defendant in error and her husband had money more than sufficient to pay their fare to Danville, and a considerable distance beyond that place. If this be true, and defendant in error swears they had, then they were engaged in a deliberate fraud on the company, no less than by false representations to obtain their passage free from Decatur to Danville, and thus defraud the company out of the sum required to pay their fare. In this there is a broad distinction from Muhling's case, as in that case there was no pretence of fraud or wrong on his part. The court below should have given some one of the defendant's instructions which announced the view here expressed.

Service Under Unusual Conditions.**EATON v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD.**

57 N. Y. 382. 1874.

DWIGHT, C. * * * There was no evidence that passengers, either habitually or occasionally (except in the present instance), rode in the caboose. There was a regulation of the defendant, printed on the tables intended for the use of its employees, that passengers were forbidden to ride on coal trains. Disobedience of this rule, if known to the defendant, was followed by a discharge of the employee so offending. Of this regulation the plaintiff had no actual notice, and it was not put up in the caboose. * * *

The question now recurs, whether there is anything in the facts of the present case to rebut the presumption which would naturally be derived from the separation of the defendant's coal business from its other transactions. If so, it must be in the authority of the conductor as a general agent of the defendant, or in the appearance of the caboose as fitted up for the transportation of passengers, or, in the conductor's invitation or suggestion as to the plaintiff's employment as a brakeman. It is a fallacy to argue that a conductor is a general agent for this purpose, assuming that his power would, as a rule, place him under the class of general agents; he only holds that position for the *management of a freight train*. The fact that the same word, "conductor," is used to designate servants in two kinds of business, which the defendant has made perfectly distinct, tends to confusion. There is no real analogy between the duties of a conductor of a passenger train and those of the manager of a strict freight train. A different class of men would naturally be employed in the two cases. The defendant has a right to assign specific duties to the one distinct from those performed by the other. It is a familiar rule in such a case, that an agent cannot increase his powers by his own acts; they must always be included in the acts or conduct of the principal. (Marvin v. Wilber, 52 N. Y. 270, 273.) No act of a conductor of a freight train will bind the company as to

carrying passengers, unless the principal in some way assents to it. In the present case, it was distinctly proved that the company forbade the act, and there was no evidence of any form of assent to its exercise, except that which may be inferred from the use of the caboose.

The caboose was not fitted up in the manner usual in passenger cars. Its general appearance showed it to be exclusively designed for the use of the defendant's servants. The plaintiff could not have been misled as he paid no fare. The conclusion is, that there was nothing in the attendant circumstances, in the present instance, to show that the conductor could, by inviting the plaintiff to get upon the train, create between him and the defendant the relation of passenger and carrier.

Special Arrangements for Particular Service.

COUP v. WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.

56 Mich. 111, 22 N. W. 215. 1885.

CAMPBELL, J. Plaintiff, who is a circus proprietor, sued defendant as a carrier for injuries to cars and equipments, and to persons and animals caused by a collision of two trains made up of his circus cars, while in transit through Illinois. The court below held defendant to the common-law liability of a common carrier and held there was no avoiding liability by reason of a special contract under which the transportation was directed. * * *

The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become

troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage.

The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. * * *

CHAPTER VI.
REGULATION OF THE EMPLOYMENT.

Conditions Upon Acceptance.

PLATT v. LECOCQ.

158 Fed. 723. 1907.

SANBORN, C. J. * * * There is another consideration which leads to the same conclusion. Courts and commissions ought not to interfere with the established rules and practice of transportation companies on account of incidental inconveniences and trivial troubles to which the conduct of all business is necessarily subject. The business of railroad companies and express companies cannot be conducted for the purpose of carrying on the business of their customers exclusively, nor without some discomforts and inconveniences to all parties engaged in any of these occupations. Unless a clear injustice is perpetrated or a substantial injury is inflicted, or there is an imminent threat of them, the annoyances and inconveniences in the transaction of the business of the transportation companies should be left for correction in the pecuniary interests and business instincts of the respective parties concerned, and their laudable anxiety to secure, retain, and increase their business. No injustice has been perpetrated in this case. No serious damage has been, or is likely to be, inflicted upon the bank by the refusal of the express company to receive money until the morning of the day when the trains depart, in view of the pregnant fact that it has elected to cause its incoming currency to be shipped to it by mail for more than a year, and to the amounts of hundreds of thousands of dollars, when it could have caused it to have been sent by this express company. No other shipper is complaining, and the practice of the express company creates no preference or prejudice to party, locality, or description of traffic, while the practice

which the bank seeks to enforce will inevitably compel other parties and other descriptions of traffic to bear a part of the burden of storing and keeping overnight the moneys it seeks to send out. There is no equity in this case of the bank, and it is entitled to no relief. Reversed.

Times Established for Service.

PHILLIPS v. SOUTHERN RAILWAY CO.

124 N. C. 123, 32 S. E. 388. 1899.

FURCHES, J. * * * It was in evidence, and not disputed, that the rules of defendant company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting-room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train at 1:20 o'clock of the next morning. * * *

So the only question remains is as to whether the defendant had the right to establish the rule for closing the waiting-room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule and that it was a reasonable one. Webster v. Fitchburg R. Co., 161 Mass. 298; 34 At. Rep. 157; 1 Elliott on Railroads, §§ 199 and 200; 4 Elliott on Railroads, § 1579.

The case would probably be different in the case of through passengers, and in the case of delayed trains; but if so, these would be exceptions and not the rule.

Waiting-rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers. But they are established by carriers as ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error. New trial.

Limitations Upon Other Services.**GARDNER v. PROVIDENCE TELEPHONE CO.**

23 R. I. 312, 50 Atl. 1014. 1901.

Decision in Gardner v. Providence Telephone Co. affirmed.

PER CURIAM. The evidence shows, as stated by the complainant, that the defendant refuses to furnish a long-distance extension set in connection with a grounded telephone circuit. The evidence does not convince a majority of the court that such a combination can be made generally without impairment of the service. The uniform practice of the company is against this contention. The company offers to annex to the complainant's grounded circuit, for a reasonable price, such an extension set as is appropriate for the circuit, and which it contends will give satisfactory service. This is all that the complainant can demand. He is in default in not requesting the company to provide what it says it is willing to give him, and in insisting on the exact form of apparatus which he has installed.

It is for the company, not for the subscriber, to determine the type of apparatus it shall use, and there is no evidence that the type it offers is inadequate. These points were fully considered by the court upon the former hearing, as a careful examination of the opinion will show. It may further be observed that in this case there is no evidence that the defendant's charge for a metallic circuit combined with a long-distance set is exorbitant. The well-known superiority of a metallic circuit to a grounded one in all essential features, and the greater cost of construction, make it reasonable to charge more for the use of the metallic circuit than for the other.

The question of price is not strictly before the court, for the complainant does not desire this kind of service, and the defendant will not tolerate the combination which the complainant has made at any price.

The motion for reargument is denied.

Present: Stiness, C. J., Tillinghast and Douglas, JJ.

Regulation Relating to Prepayment.**FUNDERBURG v. AUGUSTA & AIKEN RAILWAY COMPANY.**

81 S. C. 141, 61 S. E. 1075. 1908.

WILLIAMS, J. The circuit court has found in this case that "a tender of \$5 to pay a 5 cent fare would be disproportionate to the amount of the fare, and that, under a proper rule on the part of the carrier upon the subject, in existence and actually enforced, the carrier could not be forced to furnish change for so large an amount." He, however, held that such rule had not been brought to the notice of the traveling public, and had been habitually disregarded and waived. This shows that the circuit court would have regarded as unreasonable the tender to the defendant railroad of \$5 for a 5 cent fare, had it been admitted that defendant had promulgated a rule to that effect, and had not waived it. There is, therefore, no finding below that the rule is unreasonable, and indeed there is no fact appearing in the record to suggest a doubt of its reasonableness. The difficulty of making change in the cotton picking season in South Carolina is a well-known fact, and the court takes notice of the territory and the thick population and the numerous mill towns along the route between Augusta and Aiken, which render it probable that numerous fares will be collected on the defendant electric railway between these points on a single trip. To require defendant to furnish change for every bill presented would be unreasonable. * * *

Judgment for the defendant.

- Excess Charge for Cash Fare.**FORSEE v. ALABAMA GREAT SOUTHERN RAILROAD.**

63 Miss. 66. 1885.

TERRAL, J. It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may, in the exercise of this right, make

discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes, and inconvenience incident to collecting fare and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. *State v. Goold*, 53 Maine 279; *The Jeffersonville Railroad Co. v. Rogers*, 28 Ind. 1; *Swan v. Manchester, &c., Railroad Co.*, 132 Mass. 116.

But such a regulation is invalid, and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 *Redfield on Railways* 104; *Evans v. M. & C. Railroad Co.*, 56 Ala. 246; *St. Louis, etc., Railroad Co. v. Dalby*, 19 Ill. 353; *St. Louis, etc., Railroad Co. v. South*, 43 Ill. 176; *Smith v. Pittsburg, etc., Railroad Co.*, 23 Ohio St. 10.

Effect of Agent's Mistake.**BRADSHAW v. SOUTH BOSTON RAILROAD COMPANY.**

135 Mass. 407. 1883.

Tort for being expelled from one of the defendant's cars.

C. ALLEN, J. * * * It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car. This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.

Judgment for defendant.

Mistakes of Conductors.**PHILADELPHIA, WILMINGTON AND BALTIMORE
RAILROAD COMPANY v. RICE.**

64 Md. 63, 21 Atl. 97. 1885.

ROBINSON, J., delivered the opinion of the court: * * *
Upon these facts it is admitted an action will lie against the company for a breach of contract as a carrier, or for the negligence of the conductor in cancelling the plaintiff's ticket, and thereby destroying the only evidence of his right to the return trip; but inasmuch as the cancellation had not been corrected according to the rules of the company, the ejection of the plaintiff under such circumstances, it is argued, does not in itself furnish a substantive ground of action. We shall not stop to examine the several cases relied on in support of this contention. *Hufford v. Grand Rapids and I. R. R. Co.*, *The Reporter*, 18 Vol., 147; *Frederick v. The Marquette, Houghton and Ontonagon R. R. Co.*, 37 Michigan 342; *Yorton v. The Milwaukee, Lake Shore and Western Railway Co.*, 54 Wis. 234.

It is sufficient to say the facts in this case differ materially from the facts in those cases. Here the plaintiff was *wholly without fault*. He had purchased a ticket which entitled him to a round trip from Wilmington to Philadelphia. The return coupon was cancelled through the mistake of the conductor; this error he attempted to correct, and informed the plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington.

If the servants of the appellant under such circumstances laid their hands forcibly on the person of the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff, and an indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well settled law of this state and of this country. The mistake by which the plaintiff's ticket was cancelled was the mistake of the appellant's servant, and it must abide the consequences. There was no error, therefore, in the rulings of the court in this respect.

CHAPTER VII.

COURSE OF THE UNDERTAKING.

Neglect Contributing to Loss.

FOX v. BOSTON & MAINE RAILROAD CO.

148 Mass. 220, 19 N. E. 222. 1889.

MORTON, C. J. * * * In the case before us, the parties made a special contract, by which the defendant agreed to deliver the apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of February 23. Both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor, and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated and contemplated by the parties, and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages. The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so, because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected, a change of temperature.

The case is thus distinguished from the cases of *Denny v. New York Central Railroad*, 13 Gray, 481, and *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. In each of these cases, the loss to the plaintiff was caused by an extraordinary event, a fire and a freshet; and the court held that the defendants, although guilty of negligent delay, were not responsible, because the event was not one which would reasonably be antici-

pated. In the case at bar, the event which caused the loss was contemplated by the parties when they made their contract as a probable consequence of the breach of it.

Loss Concurrent with Delay.

**GREEN-WHEELER SHOE CO. v. CHICAGO, ROCK
ISLAND & PACIFIC RY. CO.**

130 Iowa 123, 106 N. W. 498. 1906.

McCLAIN, C. J. * * * Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation,

although it is from a cause which would not in itself render him liable. In such a case it is said "that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." *Davis v. Garrett*, 6 Bing. 716. * * *

Negligence in Not Avoiding.

EXPRESS COMPANY v. KOUNTZE BROS.

8 Wall. 342 (U. S.). 1869.

DAVIS, J. * * * To understand what are the rights of the parties to this suit, so far as the court was asked concerning them, it is necessary to see what were the facts proved in the case. It appears that the particular lot of gold dust, which is the subject of this controversy, was confided to the express company for transportation to Philadelphia, on the 29th of September, 1864, and that it was one of a series of shipments of the same kind, running through a period of eighteen months or more. The receipt given for the packages was not different from the ordinary receipts of the company, and was doubtless intended to limit the liability of the company as common carriers. There were two routes employed by the express company to convey their property—one across the State of Iowa, and the other to St. Joseph, Missouri, and thence across that State by the Hannibal Railroad. The latter was the most expeditious route, but the former the safest, as Missouri, although at the time adhering to the Union, was in a disturbed and unsettled condition. The property in dispute was conveyed by the St. Joseph route, and was robbed while in transit across the State by a band of armed men. Under the circumstances in which the country was then placed, no prudent man, in the management of his own affairs, would have sent his property

by the Missouri route, if another route were open to him. It seems that the plaintiffs acted on this idea, for one of them testifies that he notified the agent of the company not to send their gold dust by the St. Joseph route. If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in defiance of the wishes of the owner of the property, reject the safe, and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation, whenever practicable. Redfield on Carriers, § 34. In this case it was practicable to obey the instruction given by the plaintiffs, and the defendant furnishes no excuse for not obeying it.

Proper Protection of Patron.

DUNN v. WESTERN UNION TELEGRAPH COMPANY.

2 Ga. App. 845, 59 S. E. 189. 1908.

POWELL, J. The grave question remaining in the case is whether the petition sets forth a cause of action against the telegraph company. The gist of the action is not the failure or refusal of the telegraph company to transmit a message tendered to it, but the alleged disrespectful, humiliating, and insulting treatment by its agent, of a member of the general public, lawfully in its office on business with the company. The contention is that the entire damage alleged is such as affects only the feelings of the plaintiff, and that damages for mental suffering cannot be recovered unless there is a concomitant injury to person or purse. The further contention is made that no breach of duty to the plaintiff is shown. We will dispose of these contentions in inverse order.

A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in a business *sui generis*, is immaterial. It is a public service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business

in their own way. All such corporations, on account of the interest which the public has in the manner in which their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. * * *

From this principle, universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public, as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do, safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety; nor this decency mere absence of obscenity, but by the employment of the expression "safe and decent access" it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact business which the law compels a telegraph company to accept impartially from every person, by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront. A violation of this duty has occurred whenever a person entering the telegraph office for the purpose of sending a message has been met with disrespectful or insulting treatment at the hands of the company's agent. * * *

Liability for Injuries by Own Servants.

CRAKER v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

36 Wis. 657. 1875.

Appeal from the Circuit Court for Sauk County.

Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial.

RYAN, C. J. * * * These were the duties of the appellant to the respondent, when she went as passenger on its train: duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her.

If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. *Stephen v. Smith*, 29 Vt. 160; *Railroad Co. v. Hinds*, 53 Pa. St. 512; *Commonwealth v. Power*, *supra*; *Nieto v. Clark*, *supra*; and other cases cited in *Bass v. Railway Co.* We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*.

The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.

Protection From Third Persons.**BATTON v. SO. & NO. ALABAMA RAILROAD.**

77 Ala. 591. 1884.

SOMERVILLE, J. * * * The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well-considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably be expected to occur.

We do not think that there is any duty to police station houses with the view of anticipating violence to passengers which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be commonly necessary nor customary. It was a risk which was incidental to one's presence anywhere when traveling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in rulings of the court, and the judgment must be affirmed.

CHAPTER VIII.

LIABILITY FOR LOSSES.

Liability as an Insurer.

FORWARD v. PITTARD.

1 Term Reports 27 (Eng.). 1785.

This was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. * * *

Afterwards LORD MANSFIELD delivered the unanimous opinion of the Court:

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room

for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.

No Insurance for Personal Injuries.

BREMNER v. WILLIAMS.

1 C. & P. 414 (Eng.). 1824.

Assumpsit against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

BEST, C. J. The declaration states, that the defendant undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence? The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—Damages £51.

Abnormal Liability Rigidly Confined.**BOYCE v. ANDERSON.**

2 Pet. 150 (U. S.). 1829.

MARSHALL, C. J. This was an action brought in the court of the United States, for the seventh circuit and district of Kentucky, against the defendants, owners, &c.

There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, "that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes."

That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently this rigorous mode of proceeding cannot safely be adopted unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him, that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier, for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible farther.

The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them.

The directions given by the court to the jury informed them, that the defendants were responsible for negligence or unskilful conduct, but not otherwise.

Extent of Normal Liability.

LEONARD v. NEW YORK, ALBANY AND BUFFALO ELECTRO MAGNETIC TELEGRAPH CO.

41 N. Y. 544. 1870.

HUNT, J. * * * In the present case the referee has found actual negligence or want of care in the defendants' agent at Syracuse. The message, as received at Syracuse from the west, contained an order for 5,000 sacks of salt, a sack containing about fourteen pounds of fine salt. As sent by the defendants' agent, it contained an order for the same number of casks of salt—a cask containing 320 pounds of coarse salt. No excuse is given for this error, and no explanation, unless it be only that the characters by which these words are designated, nearly resemble each other. No doubt this would furnish a reason why a person ignorant of telegraphic characters or unskilled in their reading, should misunderstand them. Such are not the persons that the defendants are permitted to employ in this business. Those engaged in it profess to understand the hieroglyphics. They have, themselves, invented or adapted them. They are bound, also, to use the machinery which will in the best and safest manner deliver to them the expected messages. Careless reading or ignorant management of the machinery is no excuse; it is simply an aggravation of the offense. The negligence was quite enough to justify the action.

The rule of damages adopted by the referee was the most favorable to the defendants of any that could have been applied, unless it should have been held that no recovery could be had beyond the price paid for the message.

Act of God as an Excuse.**COLT v. McMECHEN.**

6 Johns. 160 (N. Y.). 1810.

KENT, Ch. J. I concur in the general doctrine, that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think here was a degree of negligence, imputable to the master, in sailing so near the shore under a "light variable wind," that a failure in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. (Trent Navigation v. Wood, 3 Esp. N. P. 127.) A *casus fortuitus* was defined in the civil law to be, *quod fato contingit, cuius diligentissimo possit contingere*. But as this point does not appear to have been particularly urged at the trial, and the verdict negatives the charge of negligence; and as the responsibility of common carriers may be deemed sufficiently strict, I am content not to interfere with the verdict, though I think that the evidence would have warranted the conclusion of negligence to a certain extent.

Judgment for the defendant.

Vice of the Property.**COUPLAND v. HOUSATONIC RAILROAD CO.**

61 Conn. 531, 23 Atl. 870. 1892.

SEYMOUR, J. * * * The next reason for appeal is that the court charged "that if, in the course of transportation of the animals, the agents of the defendant in charge of the train were apprised or informed by the plaintiff's agent that the transportation was causing fright to the mare, whereby she was acting badly and was in danger of being killed or hurt by further transportation, and if the defendant's agents were requested by the plaintiff's agent to set the car on the side track

at Ashley Falls, to prevent further danger to the mare, it was the duty of the defendant's agents so to do if it could reasonably have been done, and the neglect to do so would have been negligence on the part of the defendant." What actually occurred between the agents of the respective parties in this behalf was a matter of dispute which was left to the jury to decide.

The charge was correct. Most of the objections urged against it are answered by the limitation stated by the court, and it was the defendant's duty to have complied with the requests "if it could reasonably have been done." The charge was appropriate to the facts as claimed by the plaintiff.

New trial ordered.

CHAPTER IX.

SPECIAL LIMITATION OF LIABILITY.

Limitation of Liability Possible.

MAYHEW v. EAMES.

3 B. & C. 601 (Eng.). 1825.

PER CURIAM. At common law, carriers are responsible for the value of the goods they undertake to carry, but they may limit their responsibility by making a special contract, and that is usually done by giving public notice that they will not be accountable for parcels of a given description. In order, however, to show in any particular case that they are not subject to the common-law responsibility, they must prove that the party sending the goods had knowledge of the notice. But the knowledge of the principal is the knowledge of the agent. Now here the agent was employed to transmit bank notes, which are the subject of the present action, and it appears that the plaintiffs themselves had knowledge that the defendants would not be responsible for bank notes, because it is in evidence that many parcels came to them from the defendants, and that the porter delivered together with such parcels a printed paper containing a notice that "the proprietors of carriages setting out from the White Horse, Fetter Lane, would not hold themselves accountable for any glass, china, plate, watches, writings, cash, bank notes, or jewels of any description, however small the value." Now when a parcel came to the plaintiffs in this way before, they must have seen the notice, because it was contained in the same paper which they must have looked at in order to ascertain the amount of the charge for carriage and portage which they had to pay. Then if the plaintiffs knew that parcels would not be accounted for if they contained bank notes, it was their duty to tell their agent not to send any such parcels by any of the coaches coming to the White Horse, Fetter Lane. But as the plaintiffs suffered their agent to send notes by those

coaches, we think that knowledge of the notice having been brought home to the plaintiffs, the carrier is thereby protected from such loss, although the parcel was sent by an agent.

Rule refused.

Limitation of Liability as Insurer.

RAILROAD COMPANY v. LOCKWOOD.

17 Wall. 357 (U. S.). 1873.

BRADLEY, J. It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage. * * *

It is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms. * * *

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

Judgment affirmed.

Policy Against Accepting Negligence.

MYNARD v. SYRACUSE, BINGHAMTON & NEW ALBANY RAILROAD.

71 N. Y. 180. 1877.

CHURCH, C. J. * * * In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of *Lockwood v. Railroad Co.*, 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the ques-

tion cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 N. Y. 485; 24 N. Y. 181-196; 25 N. Y. 442; 42 N. Y. 212; 49 N. Y. 263; 51 N. Y. 61.

The remedy is with the Legislature, if remedy is needed. But, upon the question involved here, it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uniform course of decisions in this and most of the other States, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

Invalidity of Special Stipulations.

PRIMROSE v. WESTERN UNION TELEGRAPH CO.

154 U. S. 1, 14 Sup. Ct. 1098. 1894.

GRAY, J. This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it. * * *

The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not

recover more than the sum which he had paid for sending the single message.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages"; and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville, in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Judgment affirmed.

Limitation of Amount Recoverable.

HART v. PENNSYLVANIA RAILROAD.

112 U. S. 331, 5 Sup. Ct. 151. 1884.

BLATCHFORD, J. It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss

through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load." * * *

This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair deal-

ing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

Other Stipulations as to Liability.

EXPRESS COMPANY v. CALDWELL.

21 Wall. 264 (U. S.). 1874.

STRONG, J. Notwithstanding the great vigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy.

But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. * * *

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the

law, and inoperative. Such was our opinion in *Railroad Company v. Lockwood*. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. * * *

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Liability in Gratuitous Service.

QUIMBY v. BOSTON & MAINE RAILROAD CO.

150 Mass. 365. 1890.

DEVENS, J. When the plaintiff received his injury, he was traveling upon a free pass, given him at his own solicitation and as a pure gratuity, upon which was expressed his agreement that in consideration thereof he assumed all risk of accident which might happen to him while traveling on or getting on or off the trains of the defendant railroad corporation on which the ticket might be honored for passage. * * *

The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own

solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that, while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, or that of the corporation itself where that is the carrier, he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, in respect to the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. *Steamboat New World v. King*, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of the defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or to furnish proper appliances for the conduct of its business.

We are of opinion that where one accepts purely as a gratuity a free passage in a railroad train, upon the agreement that he will assume all risk of accident which may happen to him while traveling in such train by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must, therefore, be

Judgment for the defendant.

CHAPTER X.

TERMINATION OF THE SERVICE.

Reasonable Time After Notice.

FENNER v. BUFFALO AND STATE LINE RAILROAD CO.

44 N. Y. 505. 1871.

EARLE, C. * * * From the drift of the decisions in this State, I think we may fairly infer the following rules as to the delivery of goods at their place of destination by a railroad carrier: If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe, will be found consonant with public policy, and sufficiently convenient and practicable. (See *Powell v. Myers*, 26 Wend. 591; *Fish v. Newton*, 1 Denio, 45; *Jones v. The Norwich and New York Trans. Co.*, 50 Barb. 193; *Roth v. Buffalo and State Line R. R. Co.*, 34 N. Y. 548; *Northrop v. Syracuse B. and N. Y. R. R. Co.*, supra.)

Within these rules of law, I think the defendant in this case was not liable for the loss of the goods in question. The teamster, Austin, was plaintiff's agent. He had notice of the arrival of the goods, and paid the freight and gave the defendant a receipt for them. Just at that time the railroad employee was engaged in delivering other freight. But there was no refusal to deliver these goods, and, so far as appears, no unwillingness to deliver

them; and I think we are bound to infer, that if Austin had demanded the goods, they would have been delivered to him. It was getting late, and as Austin intended to return again the next day, for his convenience, the goods were permitted to remain. I say for *his* convenience. It matters not that it was also for the convenience of the railroad employee, or for their mutual convenience. It is sufficient that Austin could have had the goods, and that they were left under an arrangement in which he participated, and to which he assented, as much for his convenience as for the convenience of the other party. Suppose the arrangement had been to leave the goods there a week, or a month, for their mutual convenience, would the railroad company have remained liable as a common carrier? Here, then, there is a case where the consignee's agent had notice of the arrival of the goods and had an opportunity to remove them, and he left them in the defendant's freight-house, because it was more convenient for him to call for them the next morning. Under such a state of facts, when the goods were thus left in the freight-house for the mutual accommodation and convenience of both parties, should the law impose upon the one party the responsibility of an insurer? I think not, and that neither justice nor public policy requires upon the facts existing in this case the defendant should be held liable as a common carrier.

Surrender of Goods.

RICE v. BOSTON & WORCESTER R. R. CORP.

98 Mass. 212. 1867.

BIGELOW, C. J. The rulings were clearly right. The only objection now urged to them is, that it should have been held that the defendants were not liable as common carriers after the arrival of the cars at the place where the coal was to be delivered. But the position is untenable. The contract of a common carrier includes not only the transportation of merchandise to a particular point, but also its delivery there to the consignee, or the putting it into a suitable place where it can be received by him. A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due

care, and put them in a place where they will be reasonably safe and free from injury. Until this is done, the duty and responsibility which attach to a corporation as carriers do not close. *Thomas v. Boston & Providence Railroad Co.*, 10 Met. 472, 477; *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, 272. In the latter case, on which the defendants' counsel seems to rely, it is expressly stated that goods must not only be safely carried, but also be discharged on the platform of a depot, or put into a place of safety.

It was a clear breach of the duty of the defendants in this case to unload the coal in an unsuitable place, where it could not be taken away without being mingled with foreign substances, or to unload it in such manner that different sizes and kinds were mixed together so as to render it unsalable. The allegations in the declaration sufficiently set out this breach, and the plaintiff is entitled to recover under them the damages assessed by the court.

Exceptions overruled.

Setting Down Passengers.

CREAMER v. WEST END STREET RAILWAY CO.

156 Mass. 320. 1892.

BARKER, J. The plaintiff's intestate was instantly killed on Warren Street by an electric car, which, it was testified, was running at a speed of fifteen miles an hour. His death under such circumstances gave the plaintiff a right to maintain the action under the St. of 1886, c. 140, if, when killed, he was a passenger, or if, not being a passenger, he was in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck, he was walking across Warren Street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren Street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street. We are of opinion that he was not a passenger when the accident occurred, and that he

ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. *Warren v. Fitchburg Railroad*, 8 Allen, 227; *McKimble v. Boston & Maine Railroad*, 139 Mass. 542; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207, 214. But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.

Delivery to the Designated Person.

SAMUEL v. CHENEY.

135 Mass. 278. 1883.

MORTON, C. J. * * * The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an impostor, who by fraud induced the plaintiff to send

the goods to him. *Dunbar v. Boston & Providence Railroad*, 110 Mass. 26. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.

Suppose, upon the arrival of the goods in Saratoga Springs, the impostor had appeared and claimed them; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, "True, there is another A. Swannick here, but he has nothing to do with this matter; I am the one who ordered and purchased the goods; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. box 1595." The defendant would be justified in delivering the goods to him, whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.

The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is, that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say: "We have delivered the goods entrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence."

PART III

OBLIGATIONS OF PUBLIC EMPLOYMENT

CHAPTER XI.

JUSTIFICATION FOR REFUSING SERVICE.

Grounds for Refusing Service.

REGINA v. SPRAGUE.

63 Justice of the Peace, 233 (Eng.). 1899.

At the Surry Quarter Sessions, held at Kingston-on-Thames, before Mr. George Cave, chairman, and a full bench of magistrates, Martha Jane Sprague, the wife of Sidney Sprague, was indicted for that she, being the keeper of a common inn for the reception and accommodation of travelers, called the Hautboy Hotel, at Ockham, in the county of Surry, did, on the 27th of October, 1898, without sufficient cause and not regarding her duty as an innkeeper, wilfully and unlawfully neglect and refuse to supply Florence Wallace Harberton, wife of Viscount Harberton, of 108 Cromwell Road, London, then being a traveler, with victuals, which she then required, and for which she was willing to pay. The defendant pleaded "Not guilty."

Avory and Lord Coleridge addressed the jury. The chairman, in summing up, said that an innkeeper could not refuse to supply a traveler with food and lodging without some lawful excuse. Here Mrs. Sprague did not say that she had a right to dictate to Lady Harberton what dress she was to wear. Therefore the question whether ladies should or should not wear "rational dress" was not in dispute. An innkeeper could not refuse to supply food because of the particular shape of the dress of the traveler. The only question therefore was whether there was a refusal to supply food in a decent and proper place. The innkeeper could select the room provided it was a decent and proper room. Nor, in his opinion, was a guest entitled to

have a room exactly to his or her taste. The jury must judge by the requirement of ordinary and reasonable persons. The learned chairman then referred to the evidence, and asked the jury to consider whether the bar parlor was a decent and proper room for a guest to have lunch in and, further, whether the bar parlor was not to all intents and purposes part of the hotel. The jury retired to consider their verdict, and, after a short deliberation, they returned a verdict of "Not guilty."

Service Promoting Immoral Business.

**GODWIN v. CAROLINA TELEPHONE & TELEGRAPH
COMPANY.**

136 N. C. 258, 48 S. E. 636 (N. C.). 1904.

CLARK, C. J. This is an application for a mandamus to compel the defendant to put a telephone, with necessary fixtures and appliances, in the dwelling house of the plaintiff in the town of Kinston, and admit her to all the privileges accorded to other subscribers to the telephone exchange operated by the defendant in said town. It was admitted by the plaintiff that "she is a prostitute, and keeps a bawdy house within the corporate limits of the town of Kinston, and desires to have said telephone put in said bawdy house." The court being of opinion that the plaintiff was not entitled to a mandamus for such purpose, the plaintiff took a non-suit and appealed.

It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for

the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid a public nuisance.

The further consideration of this matter is not required on this application for a mandamus, but should be upon an indictment and trial of the plaintiff for the violation of law so brazenly avowed by her.

No error.

Protection From Diseased Persons.

PULLMAN COMPANY v. KRAUSS.

145 Ala. 395, 40 So. 398. 1906.

Action by Max Krauss against the Pullman Company for breach of contract contained in a ticket issued by excluding him from its car.

DENSON, J. The defendant filed several pleas in answer to the complaint. Demurrers were sustained to those numbered 4, 5, and 6, respectively. The fourth plea sets up the defense that when the plaintiff presented himself at the defendant's car for passage the conductor and passengers who had bought berths and space in said car thought that the plaintiff had a "contagious and loathsome disease"; that his hands and arms were wrapped in cloth, and that there were eruptions upon a part of his body that were visible; that a number of passengers on the said car objected to plaintiff being allowed to ride thereon, and the conductor of said car would not allow him to take passage thereon because of the appearance of the said disease; and it is averred that the plaintiff did have a loathsome and contagious disease, to wit, syphilitic eczema. The fifth plea set up a rule of the defendant company against carrying persons infected

with a contagious disease, and it is averred plaintiff had such a disease, to wit, syphilitic eczema. The sixth plea is in effect the same as the fourth plea, with the additional averment that at the time plaintiff purchased his ticket he did not communicate to the agent who sold him the ticket the fact that he had a contagious disease, and that the agent did not know that the plaintiff had a contagious disease.

The right of a person to a berth or passage on a sleeping car is not an unlimited right. But it is subject to such reasonable regulation as the defendant had prescribed for the due accommodation of passengers and for the safety and comfort of passengers.

Sleeping car companies are not bound to admit persons as passengers on its cars who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, and, *a fortiori*, persons who are afflicted with contagious or infectious disease, so that there would be a probability of other passengers contracting the disease with which said afflicted person was suffering.

As is said in *Hutchinson on Carriers*, with respect of common carriers: "As, therefore, the common carrier holds himself out as the carrier of only such goods as are in a fit condition to be carried, and may, as has been seen, notwithstanding his public profession, refuse to accept such as are unfit to be carried on account of their kind, the unsuitable manner in which they are prepared for transportation, or the insecurity or damage which they may occasion to the goods of other shippers or to the carrier himself, so the carrier of passengers, however public he may hold himself out or be engaged as such carrier, may refuse to accept persons offering themselves as passengers who are unfit to be carried, either because such person, from bad character, from being afflicted by contagious disease, from apprehended evil designs, either upon the carrier himself or his passengers, or from drunkenness or insanity, would be unfit associates for them or unsafe for the carrier." *Hutchinson on Carriers* (2d Ed.), § 540; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Wood's Ry. Law*, 1035; *Putnam v. Railroad Co.*, N. Y. 108, 14 Am. Rep. 190; *Paddock v. A. T. & S. F. R. R. Co. (C. C.)*, 37 Fed. 841, 4 L. R. A. 231. * * *

Persons Under Physical Disability.**ZACHERY v. MOBILE & OHIO RAILROAD COMPANY.**

75 Miss. 746, 23 So. 434. 1898.

WHITFIELD, J., delivered the opinion of the court:

The demurrer to the special plea should have been sustained. The former opinion of this court stated this. The blind man in this case "had, at the times referred to in the declaration, when he applied for tickets and permission to travel on defendant's cars, as much skill and ability to travel without help or attendants as any blind man could have. The declaration avers that though blind, he was otherwise qualified to travel on the railroad cars, and, in fact, had traveled for several years constantly on appellee's railroad without objection. The demurrer to this declaration was overruled, and the present demurrer to the special plea presents the same objections, and, of course, should have been sustained. It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid. And so it is not every blind person, but one who, though blind, is otherwise incompetent to travel alone on the cars. Otherwise, we would be compelled to hold that one suffering from sickness, no matter how slight, or one who had lost an arm or leg, or one, no matter how active physically, and no matter how expert a traveler, though being blind, could be shut out by such a rule. And this ought not to be, and cannot be, sound law. We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skillful or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend not on a universal, arbitrary and undiscriminating rule like this one, but on the capacity to travel unaccompanied, of the particular blind person, as shown by the proof on that point in his case.

Judgment reversed, demurrer to special plea sustained and remanded.

Refusal to Receive Because of Strike.**PEOPLE v. NEW YORK CENTRAL, ETC., RAILROAD CO.**

28 Hun 543 (N. Y.). 1883.

DAVIS, J. * * * These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment. * * *

Service Disadvantageous to Performer.**CHICAGO & NORTHWESTERN RAILWAY COMPANY
v. WILLIAMS.**

55 Ill. 185. 1870.

SCOTT, J., delivered the opinion of the court:

There is but one question of any considerable importance presented by the record in this case.

It is simply whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman holding a first-class ticket, for no other reason except her color. * * *

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some

principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. *The State v. Overton*, 4 Zab. 435.

In the case of the *West Chester & Philadelphia R. R. Co. v. Miles*, 55 Penn. 209, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations, or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race, or nativity alone. * * *

CHAPTER XII.

PROVISION OF ADEQUATE FACILITIES.

Expansion of Present Facilities.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY v. KELLY.

160 Fed. 316 (U. S. C. C. A.). 1908.

LURTON, J. * * * Telephone companies, like similar quasi-public corporations, are under a general common-law obligation to supply reasonably adequate facilities for supplying the service which they hold themselves out to do. This obligation in a proper proceeding may be enforced by compelling an enlargement of the plant, or by an action for damages due to disregard of this duty. The principle applicable to common carriers proper is sufficiently stated with its qualifications in 5 Am. & Eng. Cyc. of Law, 167, 168, and many illustrative cases are cited. But we cannot conceive that this common-law obligation is within the intent and purpose of this severe penal act. If, as we have before stated, the business of the company was conducted by individual wires aërially supported between the exchange and the telephones of the patrons, and it was its usual custom to string a pair of wires upon the plant already provided when a new customer desired a telephone, a very different question would be presented. There was evidence tending to show that to put in a new cable in order to serve Kelly would have taken some weeks at least, and would have cost the company about \$7,000, if such a cable was strung as they were using. We cannot believe that the Tennessee Legislature ever intended that the common law duty of providing facilities reasonably adapted to the business which might have with reason been anticipated should be enforced by the imposition of an arbitrary penalty of \$100 per day from the time when such connection might have been supplied had the company's cable capacity not been full. This construction would operate to ruin

any ordinary company, with profit only to such as might choose to prosecute a penal action against them. No such construction ought to be placed upon such a penal statute if it be susceptible of a more just and reasonable one. This we have no difficulty in doing, inasmuch as we regard the statute as intended only to prevent a partial and discriminating service, having regard to the capacity of the company, and the usual and customary method under which its operations were conducted.

No Provision for Expected Business.

BALLENTINE v. NORTH MISSOURI RAILROAD CO.

40 Mo. 491. 1886.

FAGG, J., delivered the opinion of the court:

* * * The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered. *Galena & Chicago R. R. Co. v. Rae et al.*, 18 Ill. 488; *Weibert v. N. Y. & Erie R. R. Co.*, 19 Barb. 36. Any other construction of the statute would be unjust to the railroad companies without benefiting the public.

It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then, must be understood in reference to each particular station, and not to the operation of the road as a whole.

Whilst it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. * * *

Power to Order Stations.

CONCORD AND MONTREAL RAILROAD v. BOSTON & MAINE RAILROAD CO.

67 N. H. 464, 41 Atl. 263. 1893.

Petition, for the location of a union station at Manchester. All the parties desire the erection of such a station, it is conceded, the public good requires; but they are unable to agree upon a location. The defendants claim that the court has no jurisdiction.

PER CURIAM. The legislature has not authorized the railroad commissioners to locate railroad stations (P. S., c. 155, §§ 11-23, c. 159, §§ 21, 22), and no other tribunal is directly invested with that power. It is conceded that the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public as well as for their own convenience and advantage. From this concession it necessarily follows that it is the legal duty of the parties to locate, erect, and maintain such a depot as public necessity requires. The fact that they are unable to agree upon a suitable location does not relieve them from that duty; and the question is, whether this obligation is an unenforceable one in the absence of express legislation upon the subject, or whether the right, which each has in the performance of its public function, to locate a union station at a reasonably convenient

point cannot be vindicated and enforced by the orders and decrees of this court.

The right of these parties and the public to have the union station at Manchester located in the proper place is a legal right, the enforcement of which is not prevented by the circumstance that the remedial power is not conferred upon a tribunal of special and limited jurisdiction. It is a right which can be judicially determined at the trial term upon a petition or bill in equity seeking such relief. The procedure will be such as is considered most appropriate for the work to be done. *Walker v. Walker*, 63 N. H. 321.

Case discharged.

Rules for Car Distribution.

STATE EX REL. CRANDALL v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

72 Neb. 452, 101 N. W. 23. 1904.

HOLMES, J. * * * The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities, and that such duties of common carriers are enforceable by *mandamus*. With this proposition we agree. Since the briefs in this case were filed, the case of *State ex rel. McComb v. Chicago, B. & Q. Ry. Co.*, 99 N. W. 309, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily, or at long intervals of time. It appears that ordinarily the respondent has cars enough to meet the usual requirements of

shippers, but that, owing to the long coal strike in the East, conditions had been abnormal, and the railroad company had at this time been unable to have returned to its line a large number of its cars which had been sent to points upon other railroads, and that it had found it necessary to impose an extra charge in the nature of a *per diem* for cars which were retained by other lines for more than thirty days, with the purpose of procuring an expeditious return of the cars; that, owing to this scarcity, it was impossible to furnish at this time all the cars necessary for use, not only by the relator, but by all other grain shippers along its lines in this state. Under this state of facts the modifying principle above quoted applies, and, if no unjust discrimination appears, no shipper has the right to complain because he has not been able to obtain carriage for all the goods which he may desire transported.

We are of the opinion that no failure of duty or unjust discrimination has been shown upon the part of respondent, and that the judgment of the district court should be affirmed.

CHAPTER XIII.

DETERMINATION OF REASONABLE CHARGES.

Principles for Determining Reasonableness—Theories as to Capitalization.

SMYTH v. AMES.

169 U. S. 466, 18 Sup. Ct. 418. 1898.

HARLAN, J. * * * We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years

ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

Perceiving no error on the record in the light of the facts presented to the Circuit Court, the decree in each case must be affirmed.

BRYMER v. BUTLER WATER CO.

179 Pa. St. 231, 36 Atl. 249. 1907.

WILLIAMS, J. * * * This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase

of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment. This whole subject was brought to the attention of the learned judge by a request that he should find as a matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request, "We have no authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction."

This ruling cannot be sustained.

Fair Percentage of Return.

SIMPSON v. SHEPARD.

33 Sup. Ct. 729.

HOLMES, J. * * * First, as to interference with interstate commerce. * * * The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year, and indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic; can be made today, which will hold tomorrow; that terminals, facilities, and connections in one state aid the carrier's entire business, and are an element of value with respect to the whole property and the business in other states; that securities are issued against the entire line of the carrier and cannot be divided by states; that tariffs should be made with a view to all the traffic of the road, and should be fair as between through and short-haul business;

and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgments of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power. * * *

Second—Are the state's acts and orders confiscatory? * * * That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they

to be held to be unconstitutional and void because they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation, and while, under the guise of such regulation, it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it, and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right. * * *

What Are Operating Costs?

ILLINOIS CENTRAL RAILROAD COMPANY v. INTER-STATE COMMERCE COMMISSION.

206 U. S. 441, 27 Sup. Ct. 400. 1907.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enforcing an order of the Interstate Commerce Commission requiring carriers to desist from charging an increased freight rate on lumber. Affirmed.

MCKENNA, J. * * * This comment, it may be said, is not applicable to the ninth and tenth propositions of appellants,

as they present propositions of law which were not only disregarded by the Commission, but the antithesis of them was asserted in the eighth finding. This contention must be specifically considered. The Commission finds that the net and gross earnings of the appellants have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, as far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" And it was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test; but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. But it is insisted that *Union Pacific Railway Co. v. United States*, 99 U. S. 402, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers. * * *

Annual Charges for Amortization.

**HOUSTON & TEXAS CENTRAL RAILWAY COMPANY v.
STOREY ET AL.**

149 Fed. 499. 1906.

On demurrers to bills to enjoin the schedule of passenger rates prescribed by the railroad commission. .

MAXEY, D. J. 8. The ninth demurrer challenges the right of the plaintiff, as claimed in paragraph 10 of the bill, to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness, in addition to paying the interest thereon. This claim of the plaintiff was doubtless based upon the decision of the Supreme Court of Pennsylvania. See *Brymer v. Butler Water Co.*, 179 Pa. 251; 36 Atl. 249; 36 L. R. A. 260. With due respect for the opinion of that high tribunal, this court is unable to concur in the view expressed by it, and therefore sustains the demurrer.

Theories of Rate Making.

KENNEBEC WATER DIST. v. WATERVILLE.

97 Me. 185, 54 Atl. 6. 1904.

Instructions to appraisers given.

SAVAGE, J. * * * The basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public. At the same time, the public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. Summarized, these elemental principles are the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation and current operating expenses, and the right of the public to have no more exacted than the services in themselves are worth. The reasonableness of the rate may also be affected for a time

by the degree of hazard to which the original enterprise was naturally subjected; that is, such hazard only as may have been justly contemplated by those who made the original investment, but not unforeseen or emergent risks. And such allowance may be made as is demanded by an ample and fair public policy. If allowance be sought on account of this element, it would be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this hazard. In determining the present value of the company's plant, the actual construction cost thereof, with proper allowances for depreciation, is legal and competent evidence, but it is not conclusive or controlling. The request that "under no circumstances can the value of the plant be held to exceed the cost of producing at the present time a plant of equal capacity and modern design" should not be given. Among other things, it leaves out of account the fact that it is the plant of a going concern, and seeks to substitute one of the elements of value for the measure of value itself.

* * *

Proper Proportion of Total Costs.

PENNSYLVANIA RAILROAD COMPANY v. PHILADELPHIA COUNTY.

220 Pa. St. 100, 68 Atl. 676. 1908.

Bill in equity for an injunction to restrain the county of Philadelphia from the collection of any penalty imposed by the act of April 5, 1907, for failure to comply with its provisions by charging passengers upon certain lines in excess of the fares therein provided.

Opinion by MITCHELL, C. J., January 20, 1908:

* * * Another objection to the method pursued in the investigation of this subject is that the court confined the inquiry to the passenger traffic instead of taking into consideration the entire traffic of every kind as appellant claims should be done. This is the most urgently pressed of the appellant's points, but it does not carry conviction. It would be sufficient answer to say that the legislature itself in the act of 1907 has treated the

passenger traffic as a separate and independent subject of examination and regulation. If the legislature may do that in ascertaining whether the charter franchise is injurious to the citizens of the commonwealth, why may not the courts do the same in ascertaining whether injustice has been done to the corporators?

Both are elements to be considered, and both are powers exercised under the same section of the constitution. But independently of this, true business principles require that the passenger and freight traffic not only may, but should be separately considered. The intelligent business of the world is done in that way. Every merchant and manufacturer examines and ascertains the unprofitable branches of his business with a view to reducing or cutting them off entirely, and there is no reason why a railroad or other corporation should not be permitted to do the same thing as long as its substantial corporate duties under its franchise are performed. While the public has certain rights which in the case of conflict must prevail, yet it must not be forgotten that even so-called public service corporations are private property organized and conducted for private corporate profit. And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusinesslike way with a resulting loss. If part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap. The corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duty must be performed even though at a loss. What is a fair profit is, as already said, a highly complicated and difficult question. The learned court below availed themselves of all the best evidence that was offered or shown to be attainable, considered it with exemplary patience and care, and their conclusion that the enforcement of the act of 1907 against the complainant would do injustice to the corporators is beyond just criticism.

Decree affirmed.

The Unit of Service.**ATLANTIC COAST LINE RAILROAD COMPANY v.
FLORIDA.**

203 U. S. 256, 27 Sup. Ct. 108. 1906.

BREWER, J. * * * And here we face this situation: The order of the commission was not operative upon all local rates, but only fixed the rate on a single article, to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the orders of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amounts of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is affirmed.

CHAPTER XIV.

PREVENTION OF DISCRIMINATION.

The Development of the Rule.

MESSENGER v. PENNSYLVANIA RAILROAD COMPANY.

8 Vroom 531, 37 N. J. L. 1874.

[The Pennsylvania Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation is, that goods have been carried for other parties at a certain rate below what the goods of the plaintiffs have been carried for, and this suit is to enforce the foregoing stipulation. The question is, whether the agreement thus forming the foundation of the suit is legal.]

BEDLE, J. The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when

the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good, to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted. * * *

**What Constitutes Illegal Discrimination—Adherence to
Schedule Rates.**

GOODRIDGE v. UNION PACIFIC RAILWAY COMPANY.

37 Fed. 182. 1889.

At law, on demurrer to answer. * * *

HALLETT, J. From all this it is apparent that the answer sets up certain considerations received by the defendant from the Marshall Company, upon which less rates are given to the latter than to other shippers. And these considerations are not in the way of a charge for carrying coal upon which any estimate can be made to ascertain the amount of such charge. Whether we refer to the claim for damages against the Denver & Western Company, or to the matter of furnishing coal for defendant's use, or to any other consideration for the contract, it is plain that there is no basis of calculation other than the rate fixed in the contract itself. It is not possible to say how much, if anything, should be added to the contract price of carrying coal on account of the claim for damages against the Denver & Western Company, or on account of canceling the contract with the Union Coal Company, or on account of fur-

nishing coal at cost for defendant's use, or on account of furnishing coal for sale, at a reduced price, or on account of any other matter mentioned in the answer. The whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant. And it is obvious that this is no answer to a complaint of unlawful discrimination.

Special Concessions to Large Customers.

SILKMAN v. WATER COMMISSIONERS.

152 N. Y. 327, 46 N. E. 612. 1897.

Appeal from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 3, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MARTIN, J. * * * The claim of the plaintiff, that the rents established by the defendant were not authorized by the act incorporating it, cannot be sustained. In broad terms, the act conferred upon the defendant the power to establish a scale of rents to be charged and paid for the use and supply of water, having reference to matters referred to in the statute, among which was the consumption of water. The objection made here is that the persons who consumed large quantities of water were not charged as much per hundred cubic feet as those who consumed a less amount. Under this statute the question of consumption was one of the elements to be considered in determining the rates. Surely, it cannot be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court interfering with them.

It follows that the decisions of the courts below were correct, and should be affirmed.

All concur.

Judgment affirmed.

Lower Rates to Exclusive Customers.

HAYS v. THE PENNSYLVANIA COMPANY.

12 Fed. 309. 1882.

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was \$1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. * * *

The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opu-

lent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. * * *

Allowances Made for Facilities.

ROOT v. LONG ISLAND RAILROAD.

114 N. Y. 300, 21 N. E. 403. 1889.

HAIGHT, J. * * * In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not ap-

pear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court. Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of \$17,000, in part for the use and convenience of the defendant. * * *

LEADING ILLUSTRATIVE CASES LAW OF MUNICIPAL CORPORATIONS¹

CHAPTER I.

DEFINITION, EVOLUTION, CREATION, DISSOLUTION, ELECTION.

Difference between Public and Private Corporations.

BLAND, CHANCELLOR, IN MCKIM v. ODOM.

3 Bland's Ch. 407 (Md.). 1829.

The multitude of bodies politic, that have been created either by the government of the Province or of the Republic, most of which still subsist, may be considered, in reference to their objects, as belonging to one or other of three distinct classes.

The first kind are such as relate merely to the public police; which, by assuming upon themselves some of the duties of the State, in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement, can be considered in no other light than as the auxiliaries of the government of the Republic; and consequently, as the secondary and deputy trustees and servants of the people. The right to establish, alter, or abolish such corporations, seems to be a principle evidently inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. These institutions being, in their nature, the auxiliaries of the government in the great business of municipal rule, cannot have the least pretension to sustain their privileges, or their existence, upon anything like a contract between them

¹ These cases are taken from Macy's Cases on Municipal or Public Corporations. Acknowledgment is made of the courtesy of Messrs. Little, Brown & Co., the publishers, in permitting this use of the cases.

and the government; because there can be no reciprocity of stipulation; and because their objects and duties are incompatible with everything of the nature of such a compact.

The power of acquiring and holding property, although almost always given, is by no means a necessary incident to all corporations of this class; they may be established without any such capacity; as in the instance of the commissioners for emitting bills of credit. 1769, ch. 14, s. 6. The preservation of morals and the administration of justice are the chief ends for which government has been instituted; and infancy, insanity, infirmity, and helpless poverty have an undoubted claim upon the protecting care of the Republic. Montesq. Sp. Laws, b. 23, c. 29. Bodies politic of this class having these objects in view, are city corporations, 1708, ch. 7; 1796, ch. 68; Levy Courts, 1804, ch. 73; County schools of the Provincial or State Government, 1696, ch. 17; 1723, ch. 19; public colleges, April, 1782, ch. 8; hospitals, 1797, ch. 102; 1816, ch. 156; trustees of the poor of the several counties, etc., 1768, ch. 29; 1785, ch. 15.

The second class of corporations are such as have no concern whatever with the duties of the Republic; nor are in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of their members. * * *

It is remarkable, that there is no instance of the creation of any body politic of this description under the Provincial government; but since the establishment of the Republic they have increased and multiplied to a very large and still rapidly growing family. The examples of this class of corporations are the insurance companies, April, 1787, ch. 20; the Free Mason societies, 1821, ch. 147; the banks, 1790, ch. 5; the manufacturing companies, 1808, ch. 49; the library companies, etc., 1797, ch. 35.

The third species of corporations partake, in many respects, of the nature of the first two classes; and are sure such as have a concern with some of the expensive duties of the State, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed and secured to their members. In cases of this kind there are certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or State is a party,

one of imperfect obligation as regards the State; Vattel, Law of Nations Prelim. § 17; and as such, subject to be dealt with by the government of the State as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the Provincial government; but since our independence, a great number of them have been called into existence; such as canal companies, November, 1783, ch. 23; bridge companies, 1795, ch. 62; turnpike road companies, etc., 1797, ch. 65.

Legal Status of Public Corporations.

PEOPLE v. INGERSOLL.

58 N. Y. 1. 1874.

This action was brought by the State of New York against Tweed, Woodward, Ingersoll, and Garvey, to recover money fraudulently obtained from the treasury of the county of New York. The plaintiff alleged in substance that the defendants, in pursuance of a fraudulent conspiracy among themselves and with others, public officers, made various fictitious claims and accounts against the county of New York, procured an issue of bonds by the said county, secured the appropriation of the money thereby obtained by the county to the payment of the said fictitious and fraudulent claims, and divided the proceeds among themselves and others. The defendant Ingersoll demurred, upon the ground, among others, that the plaintiff had no legal capacity to sue to recover this money. The State appealed from an order sustaining the demurrer.

ALLEN, J. * * * The party to maintain an action for a tort or wrong to property must be one whose property rights have been tortiously interfered with or invaded—one who, as trustee, special property man, bailee, or general owner, has been pecuniarily damaged. The State cannot, any more than an individual, have a civil action for the recovery of money, whether by way of damages for fraud or other wrong, the wrongful conversion of chattels, or for money received by and in the possession of others, except upon proof of title and ownership. A distinction is to be observed between actions by the people

or the State, in right of the prerogative incident to sovereignty, and those founded on some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are determined between individuals. * * * Whatever other remedies the people may have to redress or punish this wrong, no precedent has been referred to for the maintenance of a civil action by the people to recover either the money lost or for compensatory damages, without proof of a right in the State as a political and corporate entity to the money as owner, and which would give it a place in the treasury of the State when recovered, or for some pecuniary damages sustained by the State, the compensation for which would of right belong to its treasury. The people, by the complaint, claim as owners, and do not seek to reclaim the money and compel its appropriation to any particular use or purpose. * * *

Corporate capacity is conferred upon each county in the State, and New York is not excepted, to sue and be sued, to purchase and hold lands within its limits, for the use of its inhabitants; to make contracts and possess personal property, and to dispose of and regulate the use of its corporate property; and all suits and proceedings by and against a county in its corporate capacity are directed to be in the name of the board of supervisors of such county, that serving *pro hac vice*, as the corporate name. (1 R. S. 364, §§ 1-3; *id.*, 384, §§ 1, 2; 2 *id.*, 473; §§ 92, 95; *Supervisors of Onondaga v. Morgan*, 2 Keyes 277.) Counties are public, as distinguished from private corporations, and they are political as auxiliaries to the government of the State, and they are trustees of the people, the inhabitants within their county. (*North Hampstead v. Hampstead*, 2 Wend. 109.) They are sometimes called quasi-corporations, because not in terms declared by statute to be corporations, and have a corporate capacity only for particular specified ends. But so long as they are vested with corporate attributes, even if it be *sub modo*, the distinction is without a substantial difference within the limits of the corporate powers conferred. (2 Kent's Com. 278, 279; A. & A. on Corp. § 23.) * * *

The credit of the county, with granted power to use it, supported by the power of taxation delegated by the State, is a corporate right, and the fruits and avails of that credit, when

exercised by the borrowing of money, are as much the property and rightfully belong to the treasury of the county as if the specific sum had been granted in terms and paid from any other source. In political and governmental matters the municipalities are the representatives of the sovereignty of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring pecuniary obligations in any form, as well as in the buying and selling of property within the limits of the corporate powers conferred, they neither represent nor bind the State.

The relation of principal and agent does not and cannot exist, for obvious reasons, between the State and the various municipal corporations created with power to contract debts, in respect to the exercise of the corporate functions. Debts contracted by municipalities, by authority of the legislature, are contracted by them as principals and not as agents of the State. * * *

Judgment affirmed.

Legislative Power to Create and Alter.

BERLIN v. GORHAM.

34 N. H. 266. 1856.

ASSUMPSIT; to recover for supplies furnished for the support of Jeremiah Harding, and his wife Nancy Harding, alleged to be paupers, having their settlement in Gorham.

The plaintiffs gave evidence that when Gorham was incorporated, on the 18th of June, 1836, Jeremiah Harding resided and had his home in the place which was incorporated into that town. The court ruled that if he so resided, he would thereby gain a settlement in Gorham, although no legal town meeting was holden, and though no town officers were chosen, before his removal.

The defendant excepted to the foregoing ruling, and moved that the verdict returned for the plaintiffs be set aside.

BELL, J. By the statute of 1828 (Laws. Ed. 1830, p. 301), relating to the settlement of paupers, which is re-enacted without

material change in the Revised Statutes, ch. 65, s. 1, cl. 6 (Comp. Stat. 157), "all persons, dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town, shall thereby gain a settlement therein." It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it; and as the pauper, though he resided in the town at the passage of the act, removed before any meeting was holden, he did not gain a settlement. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, governs also the case of public corporations, like towns. See A. & A. on Corp. 68.

But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *The People v. Wren*, 4 Scam. 269; *Warren v. Mayor, etc., of Charlestown*, 2 Gray 104; *Mills v. Williams*, 11 Ired. 558; *The State v. Curran*, 7 Eng. 321; *Fire Department v. Kip*, 10 Wend. 267; *The People v. Morris*, 13 Wend. 337. * * *

Judgment on the verdict.

CHAPTER II.

THE CHARTER—CREATOR AND CREATURE.

Powers of Municipal Corporations.

CITY OF WINCHESTER v. REDMOND.

93 Va. 711. 1896.

RIELY, J. This case is before us upon a writ of error to a judgment of the Circuit Court of Frederick County rendered against the city of Winchester, for the amount of a reward offered by its common council for the apprehension and conviction of incendiaries.

The main and important question for our determination is, Did the council have the power under the law to offer the reward, and bind the city for its payment?

A municipal corporation, as well as other corporations, is, in this country at least, the creature of the legislative power of the State, and its charter is its constitution and fundamental law. Upon the provisions of its charter and such other statutes of the State as are applicable to cities and towns depend the powers that are conferred upon the corporation, and that may be exercised by its council, which is its legislative body.

It possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized. These principles lie at the foundation of the law of municipal corporations, and are the guides in the construction and adjudication of their powers.

"It is a general and undisputed proposition of law," says a distinguished jurist and eminent commentator in his excellent treatise on this subject, "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly im-

plied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dill. Mun. Corp. (3d ed.), § 89.

The city of Winchester is a municipal corporation, chartered by the legislature of the State. An inspection of its charter discloses that no express power was given to the corporation to offer a reward for the detection, apprehension, or conviction of offenders against the criminal laws of the State. Nor does any statute of the State confer upon municipal corporations such authority.

But it is claimed that the exercise of such power is authorized by section 9 of the charter of the city, which, after conferring upon the council a number of particular powers, authorizes it "to do all such things as it may deem proper for the prosperity, quiet, and good order of the city." This language, though very broad, is yet not without its proper limitation. It is to be construed with reference to the object contemplated by the State in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created.

A municipal corporation is a local and subordinate government, created by the sovereign authority of the State, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the State. And it is only in regard to the local and internal affairs of the city or town that its council, unless expressly authorized, has the right to legislate. To this end, specific powers are usually given in express words, and when a general and indefinite power, as the one under consideration, is superadded, it is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and not to be construed to comprehend a matter which is common to the State and affects its people at large. The line of distinction may not always be perfectly clear. Cases doubtless do sometimes arise, when it is not readily perceived whether the power exercised by the council of a city or town is implied in the powers expressly given or

is necessary to the accomplishment of the objects and purposes of the corporation, or whether it is wholly a State power, and only to be exercised by its legislature; but, as respects the particular case before us, there is no such difficulty. Here, the line of distinction is clearly and broadly marked.

Crime is an offense against the State, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the State. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the State are concerned in the punishment and suppression of crime. And the State, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws.

The State constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise State powers, and are in that respect State officers. As was said by Judge Staples in *Burch v. Hardwicke*, 30 Gratt. 24, 34: "When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the State. When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the State laws, and as an officer of the State; and when they are tried and convicted, it is by officers representing the State and her sovereign power." * * *

The decisions upon this question have not been uniform. It has been held by some courts (*Crawshaw v. Roxbury*, 7 Gray 374, and *York v. Forscht*, 23 Pa. St. 391) that municipal corporations possess the authority to offer rewards for the apprehension and conviction of offenders against the criminal law, but the existence of the power has been oftener, and we think correctly, denied by courts of equal dignity and respectability. *Crofut v. City of Danbury*, 65 Conn. 294; *Hanger v. City of Des Moines*, 52 Ia. 193; *Abel v. Pembroke*, 61 N. H. 359; *Gale*

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v. So. Berwick, 51 Me. 174; Butler v. City of Milwaukee, 15 Wis. 493; Patton v. Stephens, 14 Bush 324; Murphy v. City of Jacksonville, 18 Fla. 318; and Baker v. City of Washington, 7 D. C. 134. * * *

Reversed.

Property: Right of Local Self-Government

PEOPLE EX REL. LE ROY v. HURLBUT ET AL.

24 Mich. 44. 1871.

Information in the nature of *quo warranto*, brought to test the right of the members of the boards of water commissioners and sewer commissioners of the city of Detroit, to continue in office after the taking effect of an act establishing a board of public works. The questions raised relate to the validity of that act.

The act transfers to the board of public works all the powers, duties, and responsibilities of the "Board of Water Commissioners," the "Board of Sewer Commissioners," and of the "Commissioners of Grades and Plans." It gives the board charge and control of the streets, public parks, and grounds of the city, and of the construction of engine houses, city hall, and all other public buildings (except schoolhouses), public sewers, drains, and water-works. It vests in the board, for the purposes of the city, the property of the old boards, of which the water-works was the greater part; authorizes the board to take property by the right of eminent domain; to contract for the performance of the works entrusted to them, and employ workmen; to draw upon the proper funds, or, in certain cases, to issue bonds, for payment of expenses; and to make by-laws governing the public works in their charge.

The act appoints the first members of the board, specifies the terms of their offices respectively, and provides that vacancies, whether by expiration of term or otherwise, shall be filled by the common council of the city; and provides that no person shall be eligible for said board who is not a freeholder in said city, and a qualified elector.

COOLEY, J. [After referring to other questions.] We have before us a legislative act creating for the city of Detroit

a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property, and local conveniences, to make contracts for public works in behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial, for which, by the Constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: whether local self-government in this State is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure. I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now it must be conceded, that the judicial decisions and law writers generally assert that the State creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the State employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of State constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no

question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice.

Our Constitution assumes the existence of counties and townships, and evidently contemplates that the State shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the State shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the State might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupillage and dependence to any extent, and for any period of time the State might choose.

The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several State constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental

principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: First, that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.

De Tocqueville speaks of our system of local government as the American system, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible: Democracy in America, ch. 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. "Self-government," he says, "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality." Civil Liberty and Self-Government, ch. 21. The writer first named, speaking of the New England township government, whose system we have followed in the main says: "In this part of the union the impulsion

of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the State. The townships of New England remained as they were before; and, although they are now subject to the State, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary, to have surrendered a portion of their independence to the State. The townships are only subordinate to the States in those interests, which I shall term social, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests." Democracy in America, *ubi supra*. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the States have received delegations of power from independent towns; but the theory is, on the other hand, that the State governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. Hutchinson's Massachusetts Bay, ch. 1; Washburn's Jud. Hist. of Mass., ch. 1; Body of Liberties, §§ 62, 66, 72; Elliot's New England, vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time. Trumbull's Hist. of Conn., vol. 1, pp. 132, 498; Palfrey's New England,

vol. 1, p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits and possibly with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. Arnold's Hist. of R. I., ch. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, "the American system of town governments, which, necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the State, or colony, was crushed." Vol. 1, p. 487. So in Vermont, the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers, and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization. Williams' Hist. of Vermont, vol. 2, p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and, in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded. See instances in Mulford's Hist. of N. J., pp. 143-144. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes, or rights of England. Bozman's Hist. of Maryland, p. 290. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, cannot be traced. Bozman, pp. 299-303. But it cannot be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island may be said generally of the eastern and middle States, that the attempt of the last two Stuarts to overthrow their liberties was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown,

and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, "men may not destroy their political any more than their natural lives." So it is recorded they clung to "the civil liberties of New England" as "part of the inheritance of their fathers." Palfrey's *New England*, vol. 3, pp. 381-383; Bancroft's *U. S.*, vol. 2, pp. 125-127; *Mass. Hist. Col.*, XXI, 74-81. The whole contest with Andros, as well in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. "Everywhere," says Dunlap, "the people struggled for their rights and deserved to be free." *Hist. of N. Y.*, vol. 1, p. 133; and see Trumbull's *Hist. of Conn.*, vol. 1, ch. 15.

I have confined this examination to the States which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the States further south, and this, with some of their leading statesmen, was a source of regret.

Mr. Jefferson, writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our Revolution, in its commencement, in the eastern States. * * * Could I once see this, I should consider it as the dawn of the salvation of the republic." *Jefferson's Works*, vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that "it may be all one to the purse, but it worketh diversely upon the courage."

Such are the historical facts regarding local government in America. Our traditions, practice, and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it

has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a State power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the Revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it. Hammond's *Pol. Hist. of N. Y.*, vol. 1, p. 197. Moreover, the first Constitution of New York was, in important particulars, exceptional. That State had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the Constitution was revised.

For those classes of officers whose duties are general—such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called—provision has to a greater or less extent, been made by State appointment. But these are more properly State than local officers; they perform duties for the State in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the offices in question involve the custody, care, management, and control of the pavements, sewers, water-works, and public buildings of the city, and the duties are purely local. The State at large may have an indirect interest in an intelligent, honest, upright, and prompt discharge of them, but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the State line excluded the city. Conceding to the State the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the State as regards the property which the

corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day the grants of property to public corporations could not be resumed by the sovereignty. *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, *ibid.* 292; and see *Dartmouth College v. Woodward*, 4 Wheat. 694-698. When the State deals with a municipal corporation on the footing of contract, it is said by Trumbull, J., in *Richland v. Lawrence*, 12 Ill. 8, the municipality is to be regarded as a private company. In *Detroit v. Corey*, 9 Mich. 165, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the State at large had no concern. In *Warren v. Lyons*, 22 Ia. 351, it was held incompetent for the legislature to devote to other public uses land which had been dedicated for a public square. In *State v. Haben*, 22 Wis. 660, an act appropriating moneys collected for a primary school to the erection of a State normal school building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of twofold character: the one public as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the State must interpose. The State may change municipal boundaries; and then a division of the corporate property may be needful. The State may take away the corporate powers, and then the property must come to the State as trustee for the parties

concerned. In either of these cases, undoubtedly, State action becomes essential; and the property may be disposed of according to the legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for State intervention arose.

In view of these historical facts, and of these general principles, the question recurs whether our State Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. * * *

Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of State government which we call a Constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives

it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * *

The State may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the State cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the State not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

What I say here is with the utmost respect and deference to the legislative department; even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be warded off. Nevertheless, when the State reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.

But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the Constitution. That instrument provides (Art. XV, §14) that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legis-

lature may direct." It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the Constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. * * *

So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained either on general principles or on the words of the Constitution.

[Opinions were delivered also by Campbell, C. J., Christiancy, J., and Graves, J. All concurred in holding that the legislature could not make permanent appointments of local officers like those here concerned. On the question whether the appointments in this case could be sustained as provisional appointments, merely to put the act in operation and fill the offices until appointments should be made by the common council, the court was equally divided. Affirmative, Christiancy and Cooley, JJ.; negative, Campbell, C. J., and Graves, J.]

CHAPTER III.

MUNICIPAL OFFICERS AND THEIR ACTS.

Police Powers.

JUDY v. LASHLEY.

50 W. Va. 628. 1902.

APPLICATION for a writ of prohibition to restrain defendant, the mayor of the town of Davis, from proceeding against the petitioner on a charge of carrying a deadly weapon in violation of an ordinance of the town, and from attempting to collect the fine provided for in the ordinance.

The ordinance makes it unlawful "for any person to carry about his person, any revolver or other pistol, dirk or bowie knife, razor, slung shot, billy, metallic or other false knuckles or any other dangerous or deadly weapon," etc., and prohibits the sale of such weapons to minors.

Chapter 47 of the Code empowers councils of municipal corporations "to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein"; and provides that, "to carry into effect these enumerated powers," etc., "the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations, not contrary to the constitution and laws of this State," and to prescribe penalties.

POFFENBARGER, J. * * * It is urged for the petitioner that chapter 47 of the Code does not authorize a municipal corporation to punish acts already made criminal under the State law, and that the ordinance making the carrying of deadly weapons an offense punishable by the municipal authorities is void. * * *

The offense, in question here, is clearly an offense against the peace. It is not only so regarded, but is so classed by chapter 148 of the Code. Unless the ground taken by the petitioner that

the power, thus delegated by the legislature, does not include the right to punish acts already made criminal under the State law, is tenable, it is manifest that the town may, by ordinance, declare the carrying of deadly weapons an offense and punish it, for it is expressly given power to preserve peace and good order within its limits.

On this question there is much conflict in the decisions of the various States. In New York and Alabama and Missouri and some other States it has been held that, under a general authority delegated by the legislature, such as to preserve the peace and regulate the police, a municipal corporation may impose penalties for the commission of acts which, by the State law, are declared to be crimes. *Rogers v. Jones*, 1 Wend. (N. Y.) 261; *Mayor of Mobile v. Allaire*, 14 Ala. 400; *Mayor v. Rouse*, 8 Ala. 515; *Intendant of Greensboro v. Mullins*, 13 Ala. 341; *Amboy v. Sleeper*, 31 Ill. 499; *State v. Crummey*, 17 Minn. 72; *Brownsville v. Cook*, 4 Neb. 101; *Levy v. State*, 6 Ind. 281; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Gordon*, 60 Mo. 383. In some of the cases it is further held that a conviction under an ordinance may be pleaded in bar of a prosecution in the State court for the same act. *State v. Cowan*, 29 Mo. 330. This is on the ground that the constitution forbids that a person shall be twice punished for the same offense. There is another class of cases which hold that the party may be punished under both the State and the municipal law. *Fox v. State*, 5 How. (N. Y.) 410; *Moore v. People*, 14 How. (N. Y.) 13; *Slaughter v. People*, 2 Doug. (Mich.) 334.

In some other States it is held that a State cannot punish, by ordinance, what is already an offense by the statute. *State v. Keith*, 94 N. C. 933; *In re Sic*, 73 Cal. 142; *Menken v. Atlanta*, 78 Ga. 668. *Cooley*, Const. Lim. 239, says: "Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the State law on the same subject, but the State law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." It will be noticed that Judge Cooley

says these penalties may be imposed under proper legislative authority. From this it is clear that he does not mean to say that such corporations have any inherent power, or power of themselves, to punish acts which are punishable under the State law. He does not pursue the question as far as does Judge Dillon, who says, at § 367 of the 4th edition of his work on Mun. Corp.: "Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances respecting matters and acts already regulated by general statute, and, if criminal in their nature, punishable under the laws of the State. Hence, the same act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offense against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offense, one against the State and one against the corporation. Others regard the act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction." In the next section the author presents his own conclusion, deduced from the authorities, as follows: "Where the act is, in its nature, one which constitutes two offenses, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. Where the act or matter covered by the charter or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the gen-

eral laws. Such are the general principles to be extracted from the authorities."

It is evident that the exercise of such municipal power cannot extend to the whole range of acts made criminal by the State law. There must be a limit, and in the cases, holding that double punishment may be inflicted, under an indefinite delegation of power, the acts in question were generally those constituting the milder offenses under the State law. Usually they are such as bear a direct relation to or are fairly to be included within the terms of the power delegated to preserve peace and good order. This is well stated by Lumpkin, Judge, in *Mayor of Savannah v. Hussey*, 21 Ga. 86, "Can a municipal corporation legislate *criminaliter* upon a case fully covered by a State law?

"I am aware that decisions may be found to support the affirmative of the foregoing propositions. 1 Wend. 237; 16 Ala. Rep. 400; 8 ib. 515; Bay. Rep. 382; 11 Mo. 61; 12 B. Munroe, 25. Without stopping to investigate the applicability of these precedents to the point under inquiry, I ask, What limit will you set to this power? If it may legislate by an ordinance for any one offense, may it not for every crime embraced within the penal code? Arson in a town or city is provided for by the public law; why not pass a by-law prescribing another mode of trial, and a different punishment for the same offense if committed within their limits. So of the crimes of forgery, counterfeiting, perjury, etc. Such, I am sure, has not been the understanding of the country.

"Under the general grant of power delegated by the Act of 1849, the city authorities may cover all cases not provided for by the paramount authorities of the State. Their code already fills a volume of some five hundred pages. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water-works, watch, police, city taxes, city officers, health, nuisances, etc., are legitimate and proper. Nay, I might go further, and concede, that where the State law defines an offense generally, and prescribes a punishment, without reference to the place where it is committed, in town or country, and the act when committed in the streets and public places of the city would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities with a view to suppress this special mischief, might probably provide

against it by ordinance; because that ingredient or concomitant of the crime might not be supposed to be included in the State law. And this is going quite far enough."

This seems to be a conservative position on the question and one which extends to municipal corporations all power that is necessary, supplemented by the State law, which extends throughout all cities, towns, and villages of the State, to fully protect the interest and give complete exercise of all the police power of the State within municipal corporations. What more is needed? What good reason can be assigned for extending greater power when the statute does not specifically and expressly grant it? So remote from a breach of the peace is the carrying of weapons that at common law it was not an indictable offense, nor any offense at all. 5 Am. & Eng. Ency. Law (2d ed.), 729. The legislature has empowered the municipal corporations of this State to preserve peace and good order therein, but the carrying of weapons, although having a remote tendency to a breach of the peace, is more objectionable on the ground of its danger to life and limb of the citizens of the State. It is probably on that account more than any other that it is made a statutory offense in nearly all of the States of the Union. It seems to be of such character as to be clearly without the limited and indefinite power conferred upon municipal corporations in this State. It would be just as reasonable to say that that power extends to the punishment of petit larceny and arson, under the power given to protect the property of the citizens, but no such authority is claimed or exercised by our municipal corporations. It is left to the jurisdiction and cognizance of the State courts. For these reasons, and under these principles, the ordinance of the town of Davis, in reference to the carrying of deadly weapons and punishment therefor, must be held invalid, and the mayor is without jurisdiction to take cognizance as mayor of the offense charged.

This position must not be confounded with the position announced in *Moundville v. Fountain*, 27 W. Va. 182, and *Jelly v. Dils*, 27 W. Va. 267, holding that municipal corporations may punish for unlawful retailing of spiritous liquors, etc. The statute expressly gives power to such corporations to impose license taxes upon the privilege of making such sales, from which it results that the council must have power to enforce its

regulations. That is a very different matter from the case under consideration. * * *

Writ awarded.

VANDINE, PETITIONER.

6 Pick. 187 (Mass.). 1828.

PETITION for a writ of *certiorari* to the Municipal Court of Boston.

Vandine was prosecuted under a by-law of Boston, passed in April, 1826, which prohibited any person not duly licensed by the mayor and aldermen from carting house-dirt, refuse, and offal from the dwellings and buildings of the city through the streets. At the trial, the violation of the terms of the ordinance was proved, and it was agreed that Vandine was an inhabitant of the town of Cambridge. Exceptions were taken by the petitioner to instructions given to the jury.

PUTNAM, J. The first objection is that this by-law is not binding upon strangers, if it should be considered as binding upon the citizens of Boston.

Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers.

For example: a by-law of the corporation of Trinity House, "that every mariner, within twenty-four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames." Com. Dig. Bye-Law, ch. 2.

In the case of *Dodwell v. The University of Oxford*, 2 Ventr. 33, the Chancellor's Court of the University made a by-law, that whoever, privileged or not privileged, should be taken walking in the streets at nine o'clock at night, having no reasonable excuse by the proctor, etc., should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdic-

tion, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman, or stranger should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were salable or not, was held binding upon strangers as well as citizens. 5 Co. 63.

So in *Pierce v. Bartrum*, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation has jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians has for seven miles round London; whose by-laws regulating the practice of physics are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the Commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the State for the protection it affords to them during their residence.

But it is contended that this by-law is void as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good.

* * * * *

The direction and opinion of the judge of the Municipal Court was entirely correct.

Unreasonable or Abusive Action.**CITY OF CHICAGO v. BROWN ET AL.**

205 Ill. 568. 1903.

APPEAL from the County Court of Cook County.

BOGGS, J. The County Court of Cook County entered judgment refusing to confirm a special assessment levied to pay the cost of grading, paving with asphalt, and curbing Calumet Avenue from the south line of Thirty-first Street to the north line of Thirty-third Street, in the city of Chicago, and the city has appealed.

The proposed improvement covered but a distance of two blocks and one street intersection, viz., the intersection of Thirty-second Street and Calumet Avenue. Thirty-second Street, including the intersection aforesaid, had within less than four years before been paved by the city with macadam, and the evidence, practically without contradiction, showed that the pavement at the street intersection was still in good condition. The view of the County Court was that the requirement of the ordinance that the macadam pavement laid in the intersection of Thirty-second Street and Calumet Avenue, which had been in place less than four years and was in good, serviceable condition, should at the expense of the property owners be torn up and replaced by a pavement of asphalt, was so unreasonable and oppressive as to justify the court to declare the ordinance to be void.

An ordinance adopted by a city under a grant of power from the General Assembly to legislate generally on a given subject, as was the ordinance here under consideration, if unreasonable, unjust, and oppressive, will be held invalid by the courts, and whether it is so unreasonable and unjust is a question for the decision of the court, in view of the existing circumstances and contemporaneous conditions. This rule has been frequently declared, and it is not questioned by counsel for the city. The power with which the court is vested to annul the action of the law-making body of a municipal corporation should, as is suggested by counsel for the city, be exercised only in clear and strong cases, but when such a case is presented it becomes the

duty of the court to act, and protect the citizen against arbitrary and oppressive ordinances. We agree with the County Court that the ordinance here under consideration should be regarded as inoperative. The macadam pavement of the intersection had been in place less than four years. It was in good condition and no reason for removing it appeared. To impose upon the owners of the property in these two blocks affected by the ordinance the burden of defraying the expense of tearing up and removing the macadam and of re-paving the intersection with asphalt cannot be defended against the insistence that it arbitrarily and unreasonably cast upon them unnecessary expense and operated unjustly upon them. The judgment is affirmed.

CHAPTER IV.

CONTRACTS AND IMPROVEMENTS.

Public Services.

CITY OF QUINCY v. BULL ET AL.

106 Ill. 337. 1883.

BILL in chancery to enjoin the city and its officers from interfering with the laying of water pipes by the complainants in streets of the city. A demurrer was overruled and an injunction granted. Appeal by the defendants.

According to the bill, in 1873 the city council by ordinance granted one Prince the exclusive right to construct, maintain, and operate water-works in the city for thirty years, and to sell water for municipal and private use, with the right of way in all streets and alleys for the laying of mains and services. Prince was required to construct water-works within a certain time, and to extend mains when ordered by the council; and the city was required to pay a certain rate per year for each fire hydrant. The ordinance specified that upon acceptance it should constitute a contract. Prince accepted the ordinance, and has complied with it; his co-complainants claim as assignees of parts of his interest.

In March, 1881, the council passed an ordinance repealing that of 1873, and later passed ordinances restricting digging in and obstructing the streets, under which ordinances the city officers are now interfering with complainants.

SHELDON, J. * * * [The court held that the question whether the grant to Prince could be made *exclusive* was not involved in this suit.] The simple question involved here is, whether complainants, under the ordinance, have the right of way in the streets for the purpose of laying water pipes under the surface, to supply the city and inhabitants of Quincy with water, and for the purpose of repairing their pipes laid.

The ordinance of August 7, 1873, and the acceptance of it by Prince, constituted a contract between him and the city of Quincy, by which there was granted the right of way which is claimed. The power of the city to make such a grant seems quite clear. It may be derived from the exclusive control of its streets given to the city by its charter, section 33 of which is as follows: "The city council shall have exclusive power over the streets and alleys, and may abate any and all obstructions and encroachments therein in such manner as may be provided by ordinance." (Private Laws 1857, p. 170.) In this State there is vested in municipal corporations a fee simple title to the streets. Under the power of exclusive control over streets, it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets, which is not incompatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses v. Pittsburg*, *Fort Wayne*, and *Chicago R. R. Co.*, 21 Ill. 522; *Murphy v. Chicago*, 29 id. 279; *Chicago and Northwestern Ry. Co. v. Elgin*, 91 id. 251. The laying of water pipes under ground would be much less of an obstruction and interference with the ordinary purposes of a street than the laying and maintaining of a railroad track upon its surface.

It is the general doctrine that municipalities, under the power of exclusive control over their streets, may allow any use of them consistent with the public objects for which they are held, and that uses for the purpose of sewers, gas pipes, and water pipes are among those for which the use of streets may be granted. 2 Dill., *Mun. Corp.* (2d ed.), §§ 544, 551, and authorities there cited.

By section 22 of its charter the city is further empowered "to provide the city with water, to erect hydrants and pumps in the street for the convenience of the inhabitants." Private Laws 1857, p. 181. By implication from this express power to supply the city with water, the power to grant the use of the streets, as was done in the ordinance of August 7, 1873, existed in the city council of Quincy.

In 2 Dill., *Mun. Corp.* (2d ed.), § 551, it is laid down: "The use of streets for the purpose of laying down water pipes, stands upon the same principle as their use for sewers and gas pipes. Where the charter gives to the city, in terms, the power to sup-

ply, or authorize the inhabitants to be supplied with, water, the municipal council may use, or as an incidental power may permit the contractor to use, the streets for this purpose, and the adjoining feeholder is not entitled to compensation as for a new servitude, for it is not such, but only a proper or necessary use incident to a street in a populous place. And see *State ex rel. v. Cincinnati Gas Co.*, 18 Ohio St. 295; *Indianapolis v. Gas Light Co.*, 66 Ind. 396; *Des Moines Gas. Co. v. Des Moines*, 44 Ia. 508.

Under this power to provide the city with water, then, the city might have erected its own water-works and supplied itself with water, or it might have contracted with some one else to construct the water-works and furnish the supply of water to the city. The city council saw fit to adopt the latter course, and accordingly, by the ordinance in question, made a contract with Prince that he should construct the water-works, and at his own expense, and furnish the city with water. The use of the streets for the purpose of laying the water pipes may be regarded as indispensable for the construction of the water-works, so that the power to contract for their construction included, as a necessary incident, the power to contract for the use of the streets for the purpose.

We thus find that there was full power in the city council to contract with Prince for the construction of these water-works, and for his use of the streets for that purpose. This privilege of the use of the streets by Prince is not a mere license revocable at the pleasure of the city council, but it is a grant under an express contract, for an adequate consideration received, and binding as such.

The position taken by appellant in opposition to the binding force of the ordinance, as it respects the use of streets, is, that the city, in the passage of the ordinance, was acting in its public, not its private, character, and that the act was a legislative or governmental act, in the exercise of the city's legislative power of control over the use of its streets, which power of control was incapable of being abridged, but must be left free, to be exercised unrestrictedly from time to time, as the city council may see fit; and the case is put as if it were a diversion of the use of the streets from the purpose for which they were dedicated, and the permitting an obstruction in them by an individual for his pri-

vate use. As we have seen, this was no diversion of the use of the streets from their proper purpose, but a use of them consistent with such purpose. It was not for a mere private object, but for the public benefit of the city, in supplying it with water. We do not perceive how the doctrine as to the legislative governmental powers of a municipality can be brought in and have any bearing upon the facts of this case. See *DeVoss v. City of Richmond*, 18 Gratt. 338; 1 *Potter on Corp'ns*, §§ 376, 395.

We have found that the city council had power to make this contract for the use of the streets; that it had power to contract for the putting in of the water-works; that they could not be constructed without the use of the streets for the purpose,—and therefore, the power to contract for the water-works included, as a necessary incident, the power to contract for the use of the streets for that purpose. The power to make a contract, but not to make a binding one, is unmeaning. Where there is power to make a contract, there is power to make one that shall bind. We see no more to be involved here than the simple law of contract,—whether a municipal corporation may at its will repudiate the obligation of a fair contract which it has made, and which it was authorized to make. The attempt is to take back a grant which the city has made under a contract. The State itself may not revoke a grant it has made. The city must be bound by the contract, and grant it has made, and had authority to make, the same as would an individual. 1 *Potter on Corp'ns*, § 376; *City of Burlington v. Burlington Street Ry. Co.*, 49 Ia. 144. * * *

Judgment affirmed.

Ultra Vires and Irregular Contracts.

LONDON, ETC., LAND COMPANY v. CITY OF JELLICO.

103 Tenn. 320. 1899.

CALDWELL, J. The London and New York Land Company brought this bill against the city of Jellico to recover a certain sum of money for grading one of defendant's streets, under a contract made for that purpose. The chancellor dismissed the bill, but the court of chancery appeals reversed his action, and pronounced a decree in favor of the complainant for \$476.86. The principal defense interposed by the city is rested upon the

fact that the contract under which the grading was done was made at a special meeting of the board of mayor and aldermen, called without notice to some of the aldermen, and held in their absence. The result of the authorities upon the subject is that, as a general rule, every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can lawfully be taken at such meeting unless such notice has first been given, or unless the members not notified actually attend and participate in the business of the meeting. [Citations omitted.] The present contract was confessedly subject to this general rule, and, being so, it was undoubtedly invalid, and, nothing else appearing, the complainant would inevitably be repelled from court.

There is another aspect of the case, however, that demands the consideration of the court. The contract was fair and reasonable in its terms, and was within the scope of the powers conferred upon the council for the improvement of streets. It soon became known to the members of the council, who permitted it to go unrescinded and unchallenged, and allowed the complainant to continue the work through several months to completion, in the belief that all was satisfactory, and with the unquestionable result of large and permanent advantage to the municipality. Having thus received benefits for which the council might well have contracted in a proper meeting, the city will not now be heard to deny liability therefor. In such a case, liability arises by implication of law, and payment must be made according to the benefits received. The law, which always intends justice, implies a promise. [Citations omitted.] Since the price named in the invalid contract is shown to be entirely fair and reasonable, not only in view of the labor done, but also in reference to the benefits conferred, it will be taken as the true measure of recovery. * * *

The decree of the court of chancery appeals is affirmed.

CHAPTER V.

POLICE POWERS AND PUBLIC HIGHWAYS.

Power to Obstruct or Alienate a Public Way.

PETERS ET AL. v. CITY OF ST. LOUIS ET AL.

226 Mo. 62. 1909.

APPEAL from St. Louis City Circuit Court. Bill in equity by the commissioners of the South Market, in St. Louis, to enjoin the city and the city marshal from removing the market-house from Fifth Street, a public street. The market-house is a brick building, which was constructed under city ordinances in 1839. The ordinances provided that the expenses of construction and maintenance should be defrayed by contributions from individuals, and that proportionate shares should be issued to the contributors. The rents of the market were to be appropriated to the redemption of these shares, and the city reserved the right at any time to refund a sufficient amount to redeem them. Some of the shares are still outstanding. The ordinances declared the building to be a public market, and placed the management and control of it in the hands of three commissioners, to be elected by the shareholders. The commissioners were declared to be city officers, and the market was to be conducted in conformity with the ordinances of the city. The market-house is 36 feet in width and 375 feet in length, containing about forty stalls or places of business. Upon either side of the house is about thirty feet of the street. In other words, the public highway at this point is nearly one hundred feet in width, and the market place occupies 36 feet, practically in the middle thereof.

GRAVES, J. * * * But to the proposition as to the right of the city to pass the two ordinances in question. If the city had such power there is an end to this controversy. It appears that other market places were established about this time and they too were placed in the public streets. This, however, does

not change the legal status of all such ordinances and of all such acts. Such could only be considered as tending to show the city's construction of its own powers, and not further. To our mind the ordinances in question, as well as all similar ordinances, are void for the reason that they exceed the lawful powers of a municipal corporation, such as we have involved here. Where land has been dedicated as a street and thereby dedicated to public use, the same cannot be diverted from that use in the manner indicated in these ordinances. Licenses may be granted to street railways, which, for a public purpose, will subject the use of the street to additional burdens, but neither the street itself nor any portion thereof is absolutely withdrawn from use by the general public. Under such grants it has been subjected to an additional use. Not so with reference to the two ordinances in question. These ordinances absolutely withdraw from public use a material portion of a public highway. They do not merely encumber such highway with an additional public use, but absolutely withdraw the same from public use. This we say advisedly, for it is argued that the use to which the street was subjected under these ordinances is a public use. In a sense that is true. The market accommodated that portion of the population adjacent thereto, but not the general public. Public streets are for the general public and not for local interests. Licenses to railway corporations are tolerated on the theory that their limited use of the public thoroughfare is for the general public, but even such licenses cannot be tolerated when they operate in such a manner as to preclude the use of the streets in the usual and ordinary manner by the general public. *State ex rel. v. Railroad*, 206 Mo. 251, and cases cited therein.

Power to establish and control market places does not mean power to usurp the rights of the public in and to public streets. The case law seems to be firmly set this way. *Dillon*, with a citation of the case law (1 *Dill*, *Mun. Corp.* [4th ed.], §383), says: "But power to a municipal corporation to establish markets and build market-houses will not give the authority to build them on a public street. Such erections are nuisances though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be

legalized by an express act of the Legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons." [The court here cited and quoted from the following decisions: *Mayor v. Wilson*, 49 Ga. at 478; *Wartman v. Philadelphia*, 33 Pa. St. at 210; *Richmond v. Smith*, 148 Ind. at 296; *McDonald v. Newark*, 42 N. J. Eq. at 138.]

Many cases could be cited, but they all follow the trend of the original cases, and all are in harmony with the cases from this State, reviewed in *State ex rel. v. Wabash Railroad*, *supra*. A municipal corporation has no right to obstruct a public highway, by ordinance or otherwise, in the manner in which this highway is obstructed. What the city cannot do, it cannot by ordinance authorize individuals to do. The ordinances in this case upon which plaintiffs rely are void. They exceed the granted power of the city. * * * Something is said as to the statute of limitations, but this does not and cannot apply, for the reason that the plaintiffs throughout recognized that the building in question was one within a dedicated street. Plaintiffs claim under and through the city by reason of these ordinances and not otherwise. They have never asserted an independent right of possession and do not in the pleadings assert it now. From first to last their claim has been one under the grant made by these two ordinances. * * * The judgment of the trial court which dismissed plaintiff's bill should be and is affirmed.

All concur.

Public Easements: How Established.

VANN, J., IN CITY OF COHOES v. DELAWARE,
ETC., CANAL CO.

134 N. Y. 397, at 402. 1892.

PUBLIC highways may be created in four ways:

1. By proceedings under the statute. (2 R. S., 8th ed., p. 1372, et seq.; also p. 1383, § 100.)
2. By prescription, or where land is used by the public for a highway for twenty years, with the knowledge, but without the

consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public.

3. By dedication through offer and implied acceptance, or where the owner throws open his land intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. This rests upon the principle that the owner is estopped from revoking his offer after the public have acted on it for so long a period that it would be a fraud upon them if he were permitted to do so. No particular length of time is required to effect such a dedication, as every case of an estoppel in pais necessarily depends upon its own facts.

4. By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities, in charge of the subject, formally, or in terms accept it as a highway. In the absence of an actual conveyance the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway.

CHAPTER VI.

TORTS.

**For the Torts of Officers and Employees, under the Rule
Respondent Superior.**

DARGAN v. MAYOR, ETC., OF MOBILE.

31 Ala. 469. 1858.

APPEAL from the Circuit Court of Mobile. Action for damages for the loss of a slave, which, the plaintiff alleges, was negligently killed by police officers of the city while attempting to arrest the slave for violating the city ordinances. The ordinances concerned are adverted to in the opinion of the court. A demurrer to the complaint was sustained by the Circuit Court.

WALKER, J. The corporation of the city of Mobile had authority to pass ordinances providing for the arrest and punishment of slaves abroad in the city, after nine o'clock at night, without written permission; or assembling in numbers of four or more, off the owner's premises, without the permission of the mayor or one of the aldermen. This power was purely political in its character, and exclusively for the benefit of the public. As to that power, the corporation was a government, *imperium in imperio*. The employment of the officer for whose negligence in the discharge of his duty the corporation is sued, was the necessary, proper, and authorized means for the execution of that power; and the action of the officer, from its nature, was not susceptible of supervision by the corporation. See 37th section of charter. In the legislative adoption of the ordinances described in the pleading, and in the appointment of the officer, the corporation exercised a lawful authority. It is not alleged that the corporation was guilty of any negligence or misconduct in the selection of the officer.

The question here is not as to the liability of a corporation for the omission to discharge its duty; nor for the performance of

an unlawful act by it or its authority; nor for the exercise of a power not delegated; nor for the negligence of its agents, or officers, in the performance of an act for the private benefit of the corporation, or done under the immediate supervision of the corporation. The question of this case is, whether a municipal or public corporation is liable in damages, for an injury resulting from the careless or negligent official conduct of one of its officers, in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. This question we decide in the negative.

Because the corporation is, as to the passage of the ordinances and the appointment of the officer described in the pleadings, a government, exercising political power, it is irresponsible for the official misconduct alleged, upon the same principle which generally protects governments and public officers from liability for the misfeasances and malfeasances of persons necessarily employed under them in the public service. Story on Agency, §§ 319, 319a, 319b, 320, 321; Dunlap's Paley's Agency, 376. Municipal corporations, *quoad hoc* stand upon the same foundation with public officers, counties, townships, and other quasi-corporations, charged with some public duty, or invested with some portion of the authority of the government, where the employment of officers is necessary and lawful. [The court then reviewed a number of early decisions.] * * *

The judgment of the court below is affirmed.

BAILEY ET AL. v. MAYOR, ETC., OF NEW YORK.

3 Hill 531 (N. Y.). 1842.

CASE, to recover damages for the destruction of plaintiff's mill property on the Croton River by the bursting of a dam on that river. The plaintiffs allege that the bursting of the dam was the result of the negligence of agents and servants of the defendant in charge of constructing and maintaining it.

At trial it appeared that the dam had been built under the direction of water commissioners, appointed by the governor for the purpose, in pursuance of certain special statutes. These statutes provided that the commissioners should prepare and

submit to the city council a plan for supplying the city with water; and that upon the favorable vote of the city council, and of the electors of the city, and the furnishing of funds therefor by the city council, the commissioners should construct the works. Under the ordinance which instructed the commissioners to proceed with the work, securities of the city were to be issued to provide funds; and revenues, which were to be derived from furnishing water to the inhabitants, were to be devoted first to redeeming the securities. The compensation of the commissioners was to be paid by the city.

Plaintiffs excepted to the rejection of evidence that the dam was negligently and unskillfully constructed.

NELSON, C. J. The principal ground taken at the circuit against this action, and the one upon which it is understood the cause there turned was, that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam in question; inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners not being their agents in the construction of the dam, the rule respondeat superior could not properly be applied.

Another ground is now taken, which I will first notice, viz., that admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the State in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose. We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of respondeat superior does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. *Hall v.*

Smith, 2 Bing. 156; J. B. Moore, 226 S. C.; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Bolton v. Crouther*, 4 Dowl. & Ryl. 195; *Harris v. Baker*, 4 Maule & Selw. 27.

But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city, as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it, situate within its corporate limits.

The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body—such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. *Dartmouth College v. Woodward*, 4 Wheat. 668, 672; *Philips v. Bury*,

1 *Ld. Raym.* 8, 2 *T. R.* 352, s. c.; *Allen v. McKeen*, 1 *Sumner*, 297; *The People v. Morris*, 13 *Wend.* 331, 338; 2 *Kent's Com.*, 275, 4th ed.; *U. S. Bank v. Planter's Bank*, 9 *Wheat.* 907; *Clark v. Corp. of Washington*, 12 *id.* 40; *Moodalay v. The East India Co.*, 1 *Brown's Ch. R.* 469. Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers in the eye of the law would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company and be subject to the responsibilities attaching to that class of institutions. The distinction is well stated by the master of the rolls in *Moodalay v. The East India Company* (1 *Brown's Ch. R.* 469), in answer to an objection made by counsel. There the plaintiff had taken a lease from the company, granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the expiration of that period, the company dispossessed him, and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was, that the removal of the plaintiff was incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The master of the rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. "They have rights," he observed, "as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company they have entered into a private contract, to which they must be liable." It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such, they are bound to repair bridges, highways, and churches; are liable to poor rates; and, in a word, to

the discharge of any other duty or obligation to which an individual owner would be subject. 2 Inst. 703; *Thursfield v. Jones*, Sir T. Jones, 187; *Rex v. Gardner*, Cowp. 79; *Mayor of Lynn v. Turner*, id. 87; *Henly v. Mayor of Lyme*, 5 Bing. R. 91, 1 Bing. N. C. 22, s. c. in the House of Lords.

Regarding the defendants then in the light of any other private company upon whom the like special franchises had been conferred, the next question is, whether the water commissioners charged with the immediate superintendence and execution of the work stand in the relation of agents deputed by the defendants to perform this duty. If they do, it is not denied, in this aspect of the case, that the defendants are answerable to the plaintiffs for any damages sustained through the negligence or unskillfulness of the commissioners. The question depends mainly upon a construction of the Act of 1834. * * *

We have already given our views of the character of this work, and of the capacity in which the defendants hold the powers under which it has been executed. If we are not mistaken in that conclusion, and they are to be regarded as a private company, like any other body of men upon whom special franchises have been conferred for their own private advantage—such as banking and railroad corporations—then the appointment of the agents by the State did not make them less the agents of the defendants. The appointment in this way is but one of the conditions upon which the charter was granted; and stands on the footing of any other condition to be found in the grant, subject to which it has been accepted. By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work. The acceptance was entirely voluntary; for the State could not enforce the grant upon the defendants against their will. This would be so upon general principles (*A. & A. on Corp.*, 46, 50, and cases there cited); but here, the charter itself left it optional with the common council of the city to accept or not. (§ 7.) The undertaking of the work was made to depend upon the approval of the plan of the commissioners, which necessarily involved the right to adopt or reject the work itself altogether, if they disliked the system prescribed by the legislature. The approval having taken place, this, together with the subsequent measures of the common council instructing the commissioners to proceed

in the execution of the work, constituted them the agents of the defendants, as effectually so as if the latter had originally appointed them. The act of adoption in the one case was as free and voluntary as the appointment in the other. * * *

New trial granted.

For Failure to Provide for the Safety of Persons Rightfully upon the Corporate Property.

EASTMAN v. TOWN OF MEREDITH.

36 N. H. 284. 1858.

PERLEY, C. J. The following may be taken for a general statement of the case set up by the plaintiff. The town of Meredith built a town-house, to be used for holding town-meetings and other public purposes. The house, by the default and negligence of those who built it in behalf of the town, was so improperly constructed that the flooring gave way at the annual town-meeting in 1855, and the plaintiff, an inhabitant and legal voter, in attendance on the meeting, received a serious bodily injury. The accident and injury were caused by the defects and insufficiency of the building. [A lengthy discussion of early doctrines and decisions is omitted.]

Then, again, towns and other municipal corporations, including counties in this State, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property. *Bailey v. The Mayor, etc., of New York*, 3 Hill 541. So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another. So if a town or city maintain an erection or structure which is a private nuisance, and causes a special damage, or, in the performance of an authorized act, invade any right of property, the corporation has been held liable to a civil action. *Thayer v. Boston*, 19 Pick. 511; *Akron v. McComb*, 18 Ohio 229; *Rhodes v. Cleveland*, 10 Ohio 159. If the defendants in the present

case had laid and maintained the foundations of their town-house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable to an action for the damage.

The case of the plaintiff cannot be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding the annual town-meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such quasi-corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the State and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarily accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the State, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and State. * * *

We regard the present case as one of new impression. We have heard of no earlier attempts in this State to maintain an action against a town, for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other State. We believe it to have been the general understanding of the profession in this State, that an action will not lie against a town for neglect to perform a mere public duty, unless the action is given by statute. The authorities cited in support of the plaintiff's action are very distinguishable, as we think, from the present case, and there is a great weight of authority on the other side.

Our conclusion is, that this action, on the case stated to us, cannot be maintained.

For Failure to Furnish a Public Service or Protection.**MILLS ET AL. v. CITY OF BROOKLYN.**

32 N. Y. 489. 1865.

Action to recover damages for injuries to plaintiffs' premises alleged to have been caused by the insufficiency of a public sewer.

The complaint set forth that the plaintiffs were the owners of a lot, with a brick dwelling-house thereon, situate at the north-west corner of Franklin and Putnam avenues, in the city of Brooklyn; that the city corporation had, by law, the care of the streets and avenues and the control of the widening, sewerage, and draining thereof; "that the defendant, etc., negligently and unskillfully built, provided, and established sewers at the corner of Franklin and Putnam avenues; that said sewers were, and always had been, insufficient to conduct and carry away properly the water that was brought to said corner by the grade of Putnam and Franklin avenues, and the streets and avenues thereto adjacent; and that said sewers were so negligently and unskillfully built, that they failed to perform the office for which they were constructed." It was then averred, that by reason of the premises, the plaintiffs' lot and house had been repeatedly flooded with water, causing the walls to settle and crack, and the building to be otherwise greatly injured. The answer denied the averments of the complaint.

It appeared on the trial that the plaintiffs' lot in question was on low ground, forming a natural basin into which the surface water ran from all directions; prior to the paving of the streets, however, it was absorbed by the earth. The grade of Franklin and Putnam avenues was higher than the plaintiffs' lot. In March and August, 1861, heavy rain-storms occurred, and the plaintiffs' premises were inundated; and the walls of their house thereby injured; the house was built in 1860. Prior to the first storm, there was a sewer for carrying off the water under the sidewalk; and in the month of May following, the water commissioners laid down a pipe-drain earthen sewer, in the street, about twelve inches in diameter; but it proved insufficient, on the occurrence of the second storm, to carry off the water. Other facts are stated in the opinion of the court.

At the close of the testimony, the defendant's counsel moved for a dismissal of the complaint, on the ground that no cause of action had been shown. The motion, however, was denied, and an exception taken.

The jury rendered a verdict for the plaintiffs. Defendant appeals.

DENIO, C. J. * * * The grievance of which the plaintiffs complain is, that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of a certain capacity was built, but it was insufficient to carry off all the water which came down in a rain-storm, and the plaintiffs' premises were, to a certain extent, unprotected. Their condition was certainly no worse than it would have been, if no sewer at all had been constructed. So far as the one laid down operated, it relieved the plaintiffs' lot; but the relief was not adequate. If the defendants would have been liable, if they had done nothing, they are, of course, liable for the insufficient character of the work which was constructed.

But it is not the law, that a municipal corporation is responsible, in a private action, for not providing sufficient sewerage for every, or for any, part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment, and discretion. It cannot, in the nature of things, be so executed, that in every single moment, every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time, in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation, on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus, the judgment which the law has committed to the city council, or

to an administrative board, will have to be exercised by the judicial tribunals. * * *

[After referring to certain decisions.] It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary, and that the defendants were guilty of a dereliction of duty, in not having constructed one.

But the defendants put down a sewer, which was insufficient to carry off all the surface water which fell during a violent shower. There was no want of skill in constructing it; simply, it was not sufficiently large. The evidence was, that it could not have been made larger, on account of the grade and size of the system of sewers with which it connected, and through which the water had to be carried off. The evidence as to this was entirely uncontradicted; and there was nothing intrinsically improbable in the assertion. Unless the defendants were responsible for the want of judgment upon which that system was devised, I do not see why this evidence was not a complete answer to the action; and that they were not responsible for that, follows from what has already been said. * * *

The cases of *Barton v. City of Syracuse* (37 Barb. 292); *Hudson v. City of New York* (supra); *Conrad v. Trustees of the Village of Ithaca* (16 N. Y. 158); *West v. Trustees of Brockport* (in note to the last case), and *Latour v. City of New York* (3 Duer 406), are all cases where the injury was either the result of suffering a municipal work to be out of repair, or where the defendants had done acts which were in themselves positive nuisances. They furnish no ground for holding a municipal corporation responsible for not providing suitable sewerage, whether the neglect was total, or partial, only arising from the insufficiency of a sewer to discharge all the water which it was intended to carry off. * * *

Judgment reversed, and new trial awarded.

CHAPTER VII.

DEBTS, FUNDS AND TAXES.

Rights and Remedies of Creditors.

MERIWETHER v. GARRETT.

102 U. S. 472. 1880.

FIELD, J. But while the charter of a municipal corporation may be repealed at the pleasure of the legislature, where there is no inhibition to its action in the constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. * * *

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property

passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dillon, Mun. Corp. §§ 445, 446; Schaffer v. Cadwallader, 36 Pa. St. 126; City of Davenport v. Peoria Marine & Fire Insurance Co., 17 Ia. 276; Askins v. Commonwealth, 1 Duv. (Ky.) 275; The President, etc., v. City of Indianapolis, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of Oregon v. Lane County, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character. City of Augusta v. North, 57 Me. 392; City of Camden v. Allen, 2 Dutch. (N. J.) 398; Perry v. Washburn, 20 Cal. 318. Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of mandamus only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. Philadelphia v. Greble, 38 Pa. St. 339; Howell v. Philadelphia, id. 471; 2 Dillon, Mun. Corp. § 659. Levied only by authority of the legislature, they can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid

as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected,—being mere imposts of the government, created and continuing only by the will of the legislature,—have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by mandamus, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced. * * *

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeals of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: What is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer, it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its

creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

DARLING ET AL. v. THE MAYOR AND CITY COUNCIL
OF BALTIMORE.

51 Md. 1. 1878.

This appeal was taken from a decree of the court below making perpetual an injunction to restrain the appellants from levying an execution, in the nature of a *fi. fa.*, upon the property held and owned by the appellee.

ALVEY, J. * * * The alleged ground of fraud and surprise failing the appellee, the next proposition presented and relied on is, that an execution cannot be rightfully issued against a municipal corporation, on a judgment for debt or damages recovered against it. And whether such proposition, in the unqualified form stated, can be maintained, is a question of more than ordinary importance, and one in regard to which there exists a considerable diversity of opinion among those who have had occasion to consider it, in the courts of some of our sister States. The question is now presented to this court for the first time, and we must decide it, not upon precedent, but upon such reason and principle as we take to be applicable and controlling in the case.

As we understand the counsel for the appellants, it is not contended that an execution could be issued against a municipal corporation and be levied upon property owned or used by it for purely public purposes; such as a courthouse, jail, almshouse, city or town hall, police station-houses, market-house, fire-engines, etc. But it is contended that municipal corporations may hold, and that Baltimore City does hold, property in a private or quasi-private character, not necessary to the execution of the public municipal functions of the corporation, and that such property is liable to execution, on a judgment recovered against the corporation, in the same manner that it would be in the hands of an individual judgment debtor.

The corporation of the city of Baltimore, by its charter (2d vol. Code, Art. 4, §§ 1 and 2), is declared to be entitled to "purchase and hold real, personal, and mixed property, or dispose of the same for the benefit of said city"; and that "all the property and funds of every kind belonging to, or in possession of the city of Baltimore, are vested in the said corporation; and the said corporation may receive in trust, and may control for the purposes of such trusts, all money or other property which may have been, or shall be, bestowed upon such corporation by will, deed, or in any other form of gift or conveyance, in trust for any general corporation purpose, or in aid of the indigent and poor, or for the general purposes of education, or for charitable purposes of any description within the said city; and the said corporation may lease or otherwise dispose of any property belonging to the said city," etc.

As has been correctly said, a municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. *United States v. Balto. & Ohio R. R. Co.*, 17 Wall. 322; *Mayor, etc., of Balto. v. Police Board*, 15 Md. 376, 462. It is therefore incorporated for public and not private objects; and it is invested with privileges and allowed to hold property for the purposes mentioned in its charter. And in construing the power of the city of Baltimore to hold property under its charter, it was said by the Supreme Court, in the case of *McDonogh v. Murdock*, 15 How. 367, 413, that "all the property of a corporation like Baltimore is held for public uses,

and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied." It is true, there is a distinction taken, and, for some purposes, well maintained by the authorities, between property acquired for public municipal purposes exclusively, which is vested in or appertains to the corporation in its public, political, or municipal character, and which may be essential to the complete performance of its public functions, and property acquired and held by it not essential to the discharge of ordinary public municipal functions, but for the ease and accommodation of the public within the corporate limits. For instance, the supply of water or gas light to the entire population of a city is not essentially a public municipal function; for the supply of water or gas may be furnished by an independent corporation or by an individual as well as by the municipal corporation itself. It is no part of the duty of the State, through its municipal organizations, to supply these things to the people. Yet it is a common thing for the corporations of cities and towns to be clothed with authority to construct works at great cost, and the cost to be defrayed by taxation, for the supply of both water and gas to the population. So, such corporations may hold wharves and other property for the facility and encouragement of trade; though all such interests are generally acquired and held under special grants of power. And while property thus held may yield gain and profit to the city, it subserves the convenience and is for the accommodation of the public. As illustrative of the distinction stated between property held as purely public, and used only for those purposes of municipal government in which the State is interested, and property held by such corporation not so used, the case of *Rittenhouse v. The Mayor, etc., of Baltimore*, 25 Md. 336, and the cases therein referred to of *Bailey v. The Mayor, etc., of New York*, 3 Hill 531; *Masterton v. The Mayor, etc., of Brooklyn*, 7 Hill 61; and *The Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 175 and 185, may be consulted. It is in view of the distinction maintained by these authorities, and several others that might be referred to, that it is contended that an execution may issue on a judgment against the corporation, and be levied on such property as the corporation may hold in what is supposed to be its quasi-private character.

But, notwithstanding the distinction just stated, all the property held by the corporation is, as we have seen, when considered in an enlarged sense, held for public uses and benefits. It is not pretended, of course, that it would be competent, under an execution against the corporation, to seize any property held in trust by it; and all other property that it holds, not used in the exercise of its public municipal functions, is held for the general benefit and advantage of the population subject to the municipal jurisdiction. In the case of the *United States v. The Balto. & Ohio R. R. Co.*, 17 Wall. 322, before referred to, it was held that the city funds invested in a loan to the railroad company were exempt from taxation, under the United States revenue law, upon the distinct grounds that the loan itself was a municipal act, and that the money due the city was public municipal property; and as the municipal corporation was an agency, and a part of the State governmental power itself, it could not therefore be taxed. But without saying that all the property held by the city is of a strictly municipal character, that is to say, essential to the performance of public municipal functions, yet, if the city funds invested in a loan to a railroad company can be so far regarded as public property, because belonging to a municipal corporation, as to be exempted from taxation, a fortiori should that property and all other property held by the municipality be exempt from execution on judgment against the corporation. Indeed, it would be attended with the most serious consequences, and involve the greatest amount of inconvenience to lay it down as a rule that any property belonging to a municipal corporation, not actually used in the discharge of its public functions, could be levied upon and sold under ordinary execution, as upon judgment against a private corporation. Both upon principle and the reason of the thing, therefore, we conclude that an execution on judgment against a municipal corporation will not lie.

And we thus conclude the more readily because the law does not leave the creditor without ample remedy against the corporation. By the Act of 1876, ch. 367, it is provided that any municipal corporation in this State, against which there may be a judgment recovered in a court of law, shall have power to levy a sum of money upon the assessable property of such municipality sufficient to pay such judgment. And for the purposes of the

remedy in such cases, a judgment rendered by a justice of the peace may well be regarded as a judgment rendered by a court of law. It cannot be supposed that the legislature designed to exclude such judgments from the purview of the act. And it being made the duty of the corporation or those in control of its government to levy a tax for the payment of the judgment, if refused to be performed, that duty can and will be enforced by mandamus. *Watts v. President, etc., of Port Deposit*, 46 Md. 500; *Supervisors v. United States*, 4 Wall. 435; *City of Galena v. Amy*, 5 Wall. 705.

That part of the decree appealed from which makes perpetual the injunction against all proceeding under the execution is affirmed; but that part of the decree which forbids and enjoins all further proceedings upon the judgment against the appellee must be reversed.



LEADING ILLUSTRATIVE CASES LAW OF PUBLIC OFFICERS AND ELECTIONS

CHAPTER I.

DISTINCTION BETWEEN OFFICE AND EMPLOYMENT.

What Constitutes an Office.

BUTLER v. PENNSYLVANIA.

10 HOW. 402 (U. S.). 1850.

The facts are sufficiently stated in the opinion of the court, which was delivered by Justice Daniel: "By the authority of a statute of Pennsylvania of the 28th of January, 1836, the plaintiffs in error were by the governor of the state appointed to the place of canal commissioners; and by the same statute, the appointment was directed to be made annually on the first day of February, and the compensation of the commissioners regulated at four dollars per diem each. Under this law, the plaintiffs in error, in virtue of an appointment on the first of February, 1843, accepted and took upon themselves the office and duties of canal commissioners. By a subsequent statute, of the 18th of April, 1843, the appointment of canal commissioners was transferred from the governor to the people upon election by the latter and the per diem allowance to be made to all the commissioners was by this law reduced from four to three dollars, this reduction to take effect from the passage of the act of April 18th, 1843, which as to the rest of its provisions went into operation on the second Tuesday of January following its passage—that is, on the second Tuesday of January in the year 1844. Upon a settlement of their account as canal commissioners, made before the auditor-general of the state, the plaintiffs in error, out of money of the state then in their hands, claimed the right

to retain compensation for their services at the rate of four dollars per diem, for the full term of twelve months from the date of their appointment by the governor; whilst for the state, on the other hand, it was refused to allow that rate of compensation beyond the 18th of April, 1843, the period of time at which, by the new law, the emoluments of appointment were changed. In consequence of this difference, and of the refusal of the plaintiffs in error to pay over the balance appearing against them on the account as stated by the auditor-general, an action was instituted against them in the name of the state, in the Court of Common Pleas of Dauphin County, and a judgment obtained for that balance. This judgment having been carried by writ of error before the Supreme Court, was there affirmed, and from that tribunal, as the highest in the state, this cause is brought hither for revision."

"The grounds on which this court is asked to interpose between the judgment on behalf of the state and the plaintiffs in error are these: That the appointment of these plaintiffs by the governor of Pennsylvania, under the law of January 28th, 1836, was a positive obligation or contract on the part of the state to employ the plaintiffs for the entire period of one year, at the stipulated rate of four dollars per diem; and that the change in the tenure of office and in the rate of compensation made by the law of April 18th, 1843 (within the space of one year from the 1st of February, 1843), was a violation of this contract, and therefore an infraction of the tenth section of the first article of the Constitution of the United States. In order to determine with accuracy whether this case is within the just scope of the constitutional provision which has been invoked, it is proper carefully to consider the character and relative positions of the parties to this controversy, and the nature and objects of the transaction which it is sought to draw within the influence of that provision." * * * "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discon-

tinued as the public shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor promised, would appear to be neither reconcilable with natural justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes would be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher order and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or the constitution of the state, as is the case in some instances in the state constitutions, and is exemplified in the provision of the federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exceptions of those

of governor, and judges of the supreme court, and the presidents of the several courts of common pleas. The salaries of these officers cannot, under that constitution, be diminished during their continuance in office. Those of all other officers in the state are dependent upon legislative discretion. We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salaries affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested, private, personal rights thereby intended to be protected."

CHAPTER II.

CREATION AND FILLING OF OFFICES.

Eligibility of Electors and Officers.

KINNEEN v. WELLS.

144 Mass. 497. 1888.

This was an action in tort to recover damages from the registrars of the city of Cambridge for refusing to register the plaintiff as a voter in the state election of 1886. The decision of the case rests upon the constitutionality of the Statute of 1885 providing that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization."

DEVENS, J. The right or privilege of voting is a right or privilege arising under the constitution of each state, and not under the Constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the state in which he resides. He exercises this right because he is entitled to by the laws of the state where he offers to exercise it, and not because he is a citizen of the United States. * * *

The qualifications of voters are fixed by state legislation. The requisitions as to ownership of property, citizenship, sex and residence, in connection with the right of voting, vary with the constitutions or laws of the several states. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each state to define the qualifications of its voters is complete and perfect, so far as it is controlled by the fifteenth article of the Amendments of the Constitution of the United States, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude."

The question whether § 7 of the St. of 1885, c. 345, is constitutional, must be decided by determining whether this legislation is in conformity with the Constitution of this commonwealth or whether it adds anything to the qualifications which the voter is thereby required to possess, and thus interferes with the enjoyment of the rights with which this Constitution invests him.

The third article of the Amendments of the Constitution of Massachusetts, adopted in 1821, is as follows: "Every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, who shall have resided within the commonwealth one year, and within the town or district, in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid, by himself, or his parent, master, or guardian, any state or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this commonwealth; and also, every citizen who shall be, in all other respects, qualified as above mentioned, shall have a right to vote in such election of governor, lieutenant-governor, senators and representatives; and no other person shall be entitled to vote in such elections."

A reading and writing qualification was established in 1857, by article 20 of the Amendments of the Constitution. But this it will not be necessary to consider in the present discussion.

The qualifications of voters are thus defined with clearness and precision; without the possession of these, the citizen or inhabitant cannot exercise the privilege of voting, and as whoever possesses them is by the Constitution entitled to this privilege, legislation cannot deprive him of it. By the Constitution, c. 1, § 1, art. 4, full power and authority are given to the general court "from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof." To the provisions of the Constitution all legislation is thus made subordi-

nate and it cannot add to nor diminish the qualifications of a voter which that instrument has prescribed. *Blanchard v. Stearns*, 5 Met. 298, 301. * * *

The plaintiff according to the allegations of his declaration possessed, when he offered himself for registration, all the qualifications of a voter required by the Constitution. Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting. * * *

If § 7 of the St. of 1885, c. 345, were general in terms, and allowed no person to register as a voter until he had possessed the requisite qualifications for a period of thirty days, it would be difficult to maintain its constitutionality. It would still provide for adding another qualification to those required by the Constitution, as much as if the period of domicile within the town or the commonwealth, required by the Constitution before voting, were extended to a longer period. *State v. Williams*, 5 Wis. 308; *Quinn v. State*, 35 Ind. 485. * * *

But serious as these objections would be to the constitutionality of a general law applicable to all classes of citizens, it is not necessary now to consider them, as the section of the statute in question presents a difficulty even more serious. It undertakes to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the Constitution of the commonwealth, from exercising the right with which the Constitution invests them, for a period of thirty days, by forbidding the registrars of voters to register them during that period. All citizens must stand equal before the law, and the statute, assuming them to be citizens, imposes this prohibition upon them as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible under the Constitution to select a single class and impose it on this class alone. * * *

No argument in favor of the constitutionality of the section can be founded upon any peculiarity in the situation of naturalized citizens, which renders an inquiry in regard to their qualifications different from similar inquiries when applied to all other citizens. The regulation which it assumes to make is partial, and calculated injuriously to restrain and impede, in the exercise of its rights, the class to which it applies, in that it denies to this class, for the period of thirty days, the exercise of a right which the Constitution has conferred upon it. There is no warrant for this within the just and constitutional limits of the legislative power, which permits reasonable and uniform regulations to be made as to the time and mode of exercising the right of suffrage, and as to the ascertainment of the qualifications of voters. We must therefore pronounce § 7 of the St. of 1885, c. 345, to be unconstitutional. * * *

PEOPLE EX REL. FURMAN v. CLUTE.

50 N. Y. 451. 1872.

This case involves the question of the effect of the ineligibility of one of two candidates where the one who is eligible receives but a minority of the votes cast.

FOLGER, J. The second question to be considered is whether Furman, the relator, was, at the general election of 1871, duly elected to the office. Neither a majority nor a plurality of all the ballots found in the boxes were for him. He had but a minority of them.

It is the theory and general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government, that a minority of the whole body of qualified voters may elect to an office, when a majority of that body refuse or decline to vote for anyone for that office. Those of them who are absent from the polls, in theory and practical result, are assumed to assent to the action of those who go to the polls; and those who go to the polls and who do not vote for any candidate for office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for office, if for any valid reason their

votes are as if no votes, they are also bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of holding the office. And then he who receives the highest number of earnest valid ballots, is the one chosen to the office.

We may go a step further. They who, knowing a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for anyone for that office. But when shall it be said that an elector so knows of a disqualification rendering ineligible the person, and knowing, persistently casts for him his ballot? There may be notice of the disqualifying fact, and of the legal effect of it, given so directly to the voter, as that he shall be charged with actual knowledge of disqualification.

There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as a matter of law. In modern times Lord Denman, C. J., thus puts a case: "No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon the fact." *Gosling v. Veley*, 7 Ad. & Ell., N. R. 406-439; 53 Eng. Com. Law, 406. And then referring doubtless to the viva voce manner of voting in England, and to the manner of keeping polling books there, and to the fact of the number of electors there being small, so that for whom each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned judge continues: "But in no such case are the electors who vote for him deprived of their vote if the fact becomes known and is declared while an election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the

election declared void; but the candidate in the minority will not be deemed ipso facto elected. But where an elector, after voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises."

To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of the law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point, there is no essential difference of result. All agree that there must be prior notice to, or knowledge in the elector of fact and law, to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector having notice of the fact is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others deny that the maxim "*Ignorantia juris excusat neminem*" (even with the clause of it, "*quod quisque scire tenetur*," not often quoted, and of which we are reminded by the very thorough brief of the learned counsel for the relator), can be carried on to that length, and insist that there does not apply in this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for a civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, "Your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you." But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows that it cannot be counted, as to manifest a purpose to waste it.

The maxim itself concedes that there may be a lack of actual knowledge of the law. But it is ignorance of it which shall not excuse. Then the knowledge of the law to which each one is held is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than the statute goes itself. The statute but makes ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel of the relator has found some from courts in other sister states. *Gulick v. New*, 14 Ind. 97, is to that effect. *Carson v. McPhetridge*, 15 id., 331, follows the last cited case. *Hatchison v. Tildon*, 4 Har. & McH., 279, was a case at Nisi Prius, and is to that effect. With respect for those authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. *Commonwealth v. Read*, 2 Ashmead 261, is also cited. But that was a case of a board of twenty assembling in a room to elect a county treasurer. On motion being made to elect viva voce, a protest was made that the law under which they were acting prescribed a vote by ballot. Thus actual notice of the law and fact was brought to each elector before voting. Nineteen persisted in voting viva voce. These were held to be wasted votes. One voted by ballot; and his vote was held to prevail, and the person he voted for to be elected. *Commonwealth v. Cluley*, 56 Penn. St. 270, is also cited. But the language of the court there is: "The votes cast at an election for a person who is disqualified from holding office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal." And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the constitution; and a case in facts quite like this in hand. * * *

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen

to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. *Saunders v. Haynes*, 13 Cal. 145; *State v. Giles*, 1 Chand. (Wis.) 112; *State v. Smith*, 14 Wis. 497. And in *Dillon on Mun. Corp.*, p. 176 § 135, it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author of the foot-note, some of which are cited above.

We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when the action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both law and fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied.

To state a truism: our theory of government by the people is upon the assumption that the people, as a whole, are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage, and are unready to pretermitt its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and that going through with outward signs of an election they will of intent so cast their ballots, as that they will be votes wasted.

Now the finding in this case is, that there was no proof of

actual notice of Clute's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor.

There was but this fact, and the law upon the statute book; sufficient in themselves, as we hold, to render him ineligible.

But therefrom to give the office to the relator, it is first to be presumed, as a matter of law, that near 300 of those who voted for Clute had knowledge of the fact that he was supervisor; had knowledge of the existence of the act of 1853; and knew that, the fact and the law concurring thus, he was ineligible to receive and avail himself of their votes in his favor, and knew that their votes given to him were wasted, without effect upon the count.

It is to be presumed further, that knowing this, they all, though seemingly desirous of taking an effectual participation in the choice of a person to the office of superintendent, deliberately so acted as that they are assumed to have persisted against knowledge; determined to "do nothing but tender their vote for him."

When Appointment to Office Is Complete.

MARBURY v. MADISON.

1 Cranch 137 (U. S.). 1803.

This was an application for a mandamus commanding Madison, then Secretary of State, to deliver to the plaintiffs their several commissions as justices of the peace in the District of Columbia.

CHIEF JUSTICE MARSHALL delivered the opinion of the court:

In the order in which the court has viewed this subject, the following questions have been considered and decided:

- 1st. Has the applicant a right to the commission he demands?
- 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- 3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

- 1st. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February, 1801, concerning the District of Columbia. * * *

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of the peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the Constitution declares, that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the United States."

An act of Congress directs the Secretary of State to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the Senate, or by the President alone, provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the Constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President and is completely voluntary.

2d. The appointment. This is also the act of the President and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same;

since the power to perform them is given in two separate and distinct sections of the Constitution: The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution, which authorizes Congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments"; thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers, appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the President has commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence? The answer to this question seems an obvious one. The ap-

pointment being the sole act of the President, must be completely evidenced, when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission.

* * * * *

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to vest the person with his office has been done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

* * * * *

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office would himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom the duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed, not to a person to be appointed, or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the Secretary of State would be, to every intent and purpose, equal to the original. The act of Congress has expressly made it so. * * *

In the case of commissions, the law orders the Secretary of State to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of the peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity. * * *

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the

President, and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. * * *

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast upon the jurisprudence of our country, it must rise from the peculiar character of the case. * * *

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted. * * *

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying

the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

The power of nominating to the Senate and the power of

appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right was vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defense has depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is, then, the opinion of the court:

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of the peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that

the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies.

This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be "a command issued in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice." * * *

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission, on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the Secretary has received from the President for his use. The act of Congress does not indeed order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him than by any other person. * * *

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in

cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States."

[The court holds that the issuing of a writ of mandamus is an act of original jurisdiction; that the Constitution defines the scope of this jurisdiction, Congress cannot enlarge this jurisdiction. Therefore, the statute which attempted to enlarge the jurisdiction is unconstitutional. Although Marbury was duly appointed and was entitled to his commission, he could not get it by mandamus in the Supreme Court.]

CHAPTER IV.

ACCEPTANCE AND ELIGIBILITY.

Obligation to Accept Office.

PEOPLE EX REL. INSURANCE COMPANY v. WILLIAMS.

145 Ill. 573. 1893.

The plaintiff seeks by mandamus to compel the respondent to qualify and perform the duties of town clerk of Mount Morris, Ogle County, Illinois.

SHOPE, J., delivered the opinion: The principal question presented, is, whether mandamus will lie to compel acceptance of a municipal office by one who, possessing the requisite qualifications, has been duly elected or appointed to the same.

It is stated by text writers that no case has arisen in this country involving this precise question (Merrill on Mandamus, § 145; Dillon on Mun. Cor., § 162), and in the researches of counsel, and our own examination, none have been found. There are, however, a number of cases where analogous questions, involving the same principle, have been elaborately discussed and determined in the State and Federal courts. Very many English cases are found, in which it has been held that it was a common law offense to refuse to serve in a public office, to which one has been elected or appointed under competent authority; and that mandamus will lie in such case to compel the taking of the official oath, and entering upon the discharge of the public duty. It is objected that these cases do not show that mandamus would lie for the refusal to accept public office, prior to the fourth year of James the First. If the contention be true, it is unimportant whether the particular remedy was by mandamus, by the ancient common law, or not.

* * * Citation from cases will not be necessary; so uniformly has the doctrine been maintained, that there is a legal

duty to accept an office when duly elected or appointed, in a public or municipal corporation, at common law, and that mandamus is an appropriate remedy in cases of refusal, that it is accepted by all the text writers. * * *

It follows, necessarily, that if to refuse the office is a common law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by mandamus.

While offices of this class, in England, were accepted as a burden, they have not been generally so regarded in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those which bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea, that one holding a public office may resign at will, may be attributed the want of decisions in this country upon the precise question at issue. * * *

All citizens owe the duty of aiding in carrying on the civil departments of government. In civilized and enlightened society men are not absolutely free. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as witness, and without compensation is required to join the posse comitatus at the command of the representative of the sovereign power. He may be required to do military service at the will of the sovereign. These are examples where private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of the government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government.

It is admitted by the demurrer, that the respondent was legally appointed town clerk of the town of Mount Morris. The

office is connected with, and necessary to, the levy of taxes to carry on the municipal concerns of the town and administration of its local jurisdiction. It is shown, that there was a public necessity, as well as that relators had a private interest in the performance of the duties of that office. No election had been held in the town since the annual town meeting of 1891. Numerous persons had been appointed to said office, but it remained vacant, and the duties consequently, undischarged. It is admitted by the demurrer also that claims against the town, in favor of the relator, to a large amount, had been audited by the board of town auditors of said town, and allowed, and certificate thereof duly made, as provided by law, but that the same could not be delivered to or filed with the town clerk, because of such vacancy in said office, nor could the aggregate amount therefore be certified to the county clerk of said county, to be levied and collected as other town taxes. It is conceded, that the respondent was eligible to the office; that a vacancy therein existed; that he was appointed conformably to the law, and duly notified thereof. * * *

It is insisted, that the legislature having provided a penalty for the refusal to accept the office, that that remedy is exclusive, and that a payment of the penalty imposed was intended to be in lieu of the service. We cannot concur in this view. The purpose of imposing the penalty, was to enforce the acceptance of the office and performance of its duties, and the statute cannot be construed as intending that the person chosen should be discharged from the duty by payment of the penalty, and thereby the purposes of the creation of the office frustrated, and the public duty remain unperformed. Authorities *supra*. It is to be presumed that, had the legislature intended that the payment of the fine should be in lieu of the service, they would have so enacted, and not having done so, the duty remains, notwithstanding the imposition of the fine or penalty. High, Ext. L. Rem., 334, and *supra*. * * *

We are of opinion that the respondent ought to be required to accept the office of town clerk of said town, to which he has been duly and legally appointed, to take and file the oath as such town clerk, as provided by law, and to discharge the duties of said office and a peremptory writ of mandamus is awarded accordingly.

Bribery as a Disqualification—Pre-election Promises.

ROBERTSON v. ROBINSON.

65 Ala. 610. 1880.

A contract made before election to appoint one of the voters a deputy, is a means of influencing voters which is contrary to public policy and void.

BRICKELL, C. J. * * * All agreements or contracts having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void: "and the reason why the common law says such contracts are void, is for the public good." The agreement between Sewell and appellant, it is insisted, falls within this general principle, because, in fact, it was a sale of the office or employment of deputy assessor of the county of Montgomery. Whether this is the real character of the agreement, and, if it be, whether it is offensive to law, and violative of public policy, requires that the whole transaction should be inquired into and considered. The form of the agreement, and the expressions embodied in the writing to which it was reduced are only matters of evidence, not operating an estoppel upon the parties, and not embarrassing or hindering the court. If it were otherwise—if the manner of the transaction could gild over and conceal the truth, this great conservative principle of the law essential to the purity of the administration of justice, of public morals, and of the general welfare, would be evaded at the pleasure of the designing, the wicked and the corrupt.

The county assessor of taxes is a public officer, elected by the qualified voters of the county, commissioned by the governor, required to take the oath of office prescribed by the constitution to be taken by all public officers, the highest or lowest, and charged with duties of great importance to the public and to the citizen—duties not only ministerial, but in their nature in some respects, judicial. He has authority to appoint deputies, whose acts have the force and effect of his official acts, and for

whose good conduct he is responsible. Code of 1876, 397. The deputy appointed by him, not for a mere particular case, or for a mere casual, special service, is required to take the constitutional oath of office. The statute authorizing his appointment, requiring him to take the oath of office, distinguishing between him and one whom the assessor may appoint to a special service, places him in many respects as a public officer.

The transaction between Sewell and the appellant had its origin on the day of, and pending, the election of tax-assessor for the county of Montgomery, in November, 1874. It commenced by a proposition made by Sewell to the appellant, in substance, that if Sewell, who was a candidate for tax-assessor, was successful, he would appoint the appellant his chief deputy, and pay him from the fees and perquisites of the office twenty-five hundred dollars annually, if the appellant would make for him his official bond, and perform all the duties of the office, except such as related to the assessment of the poll-tax. The proposition was accepted, and it is this agreement the subsequent writing was intended to embody, and which the parties treated as embodying.

Of such an agreement in the strong language of Chief Justice Wilmot, in *Collins v. Blanter*, 2 Wils. 241 (1 Smith's L. C. Pt. 2, 673), it may be said, that it "is void ab initio, by the common law, by the civil law, moral law, and all laws what ever." It concerns a place of public trust, in which the public have high interests, involving the performance of public duties, and which cannot be made the subject of traffic, and cannot become the matter of trade and bargaining. It was corrupting the appellant as a voter, bound by his duty to cast his vote from public, not private considerations, on the eve of the election to make such a proposition; tempting him to merge his duty as a citizen in the promptings of mere selfishness, in the gratification of his avarice. It was bargaining away the discretion in the appointment of a deputy which Sewell was bound to exercise for the public good, and not for the promotion of his private interest or convenience. It was an irrevocable appointment, continuing during the term of office, which was contemplated, fettering the power of appointment with which Sewell was clothed by law. In fact, it was a sale of the office of deputy, and the consideration was not only the service the

appellant was expected to render, but the making of the official bond. The people of Montgomery county, trusting to the integrity and good judgment of Sewell, elected him to the office of assessor of taxes. Their confidence was repaid by his transfer to the appellant of every duty not merely ministerial, attaching to the office, in consideration really of ease and convenience in making the official bond. It would be far better that public trusts, public offices, or the deputations to them should be exposed at public auction to the highest, or to the lowest bidder, than that they should become the subject of such private bargaining and traffic. We cite numerous authorities, which it is unnecessary to review specially, and in which the bargaining away of public offices, or of deputations to them, have been pronounced void.

CHAPTER V.

DE FACTO OFFICERS.

Right to Compensation of De Facto Officer.

NICHOLS v. MACLEAN.

101 N. Y. 526. 1886.

An officer de jure may recover the amount of his salary drawn by an officer de facto who has prevented him from exercising the duties of the office. Validity of removal by the mayor may be reviewed by certiorari.

ANDREWS, J. The facts, upon which this controversy depends, are few and substantially undisputed. The plaintiff was duly appointed police commissioner of the city of New York, for a term of six years, from May 1, 1876, and duly qualified and entered upon and discharged the duties of the office until April 18, 1879. On that day the mayor of the city appointed the defendant, MacLean, police commissioner for the unexpired term of the plaintiff Nichols, the certificate of appointment reciting that the appointment was made by the mayor in pursuance of chapter 300 of the Laws of 1874, in place of Sydney P. Nichols, removed.

Prior to the appointment of the defendant MacLean, the mayor had preferred charges against Nichols of official delinquency, upon which such proceedings were had that on the 5th day of April, 1879, the mayor made a certificate in writing removing the plaintiff from his office of police commissioner, which certificate with the reasons therefor he transmitted to the Governor, who on the 17th day of April, 1879, approved in writing of such removal. The plaintiff, in June, 1879, applied for a writ of certiorari, to review the proceedings removing him, which was issued August 12, 1879, addressed to the mayor, who made return thereto, and on February 11, 1880, judgment was rendered in the proceeding declaring that

the proceedings of the mayor for the removal of Nichols and his judgment of removal "be and are hereby reversed, and in all things held for naught." * * * The defendant, MacLean, on the 18th day of April, 1879, on presenting his certificate of appointment was duly recognized by the board of police commissioners as commissioner in place of Nichols, and thereupon assumed the duties of the office and continued to act as police commissioner until February 7, 1880, on which day the decision of the court in the certiorari proceeding having been called to the attention of the board, Nichols was officially recognized as commissioner, and on that day resumed, and thereafter continued to discharge the duties of the office. During the period between the 17th of April, 1879, and the 7th of April, 1880, the defendant drew and received from the city of New York \$4,700 salary for that time of the office of police commissioner. It is found that the plaintiff during the time he was excluded from the office was ready and willing to perform the duties thereof, and it was proved that the plaintiff on the 18th day of April, 1879, upon presentation by the defendant of his certificate of appointment protested to the defendant that his removal was unauthorized and that there was no vacancy to be filled by the mayor. This action is brought to recover the salary received by the defendant during the time he served as police commissioner under the appointment of the mayor, and the sole question is whether, upon the facts found, the action lies.

* * * The plaintiff, by his appointment, acquired the right to hold the office of police commissioner for six years, and to receive the salary, subject to removal upon a hearing, for cause, which right, although not technically property, was valuable and is under the protection of the law. From a very early period of the law, the invasion of a right to hold and exercise the duties of a public office has been recognized as a legal wrong for which the law affords a remedy. * * * That the action of the mayor in removing the plaintiff was wrongful, was adjudicated in the certiorari proceedings, and from the judgment therein no appeal was taken. * * * Whether the judgment ipso facto worked a reinstatement of the plaintiff, we need not now consider. The defendant voluntarily surrendered the office to the plaintiff, or at least he acquiesced in his resuming possession. * * *

* * * But it is insisted that, conceding the unlawful expulsion and the intrusion by the defendant, it is not *res judicata* in this state that an action can be maintained by the party dispossessed, against the intruder, to recover the emoluments of the office received by him. In the case of *Dolan v. Mayor, etc.* (68 N. Y. 274), it was assumed that such an action could be maintained, and authorities were cited to maintain the proposition. The determination of this question was not, perhaps, essential to sustain the judgment in that case. But we think the doctrine is well founded in reason and authority. The plaintiff being the officer *de jure*, was entitled to earn the salary. It is true that he did not render the service for which the salary is the compensation. But he was ready and willing to render it, and was prevented by the conjoint acts of the mayor and the defendant. The case of *McVeany v. The Mayor* (80 N. Y. 185), shows that the right to a salary of an office is not necessarily dependent upon the actual rendition of service by the claimant. In that case the plaintiff was allowed to recover from the city, salary from the time judgment of ouster against the incumbent was pronounced, although the plaintiff rendered no personal service and the salary had been paid to the intruder. In the *Dolan* case (*supra*), the claimant recovered the salary unpaid during the time Keating discharged the duties of the office.

* * * But as a final point the defendant invokes for his protection, the doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal. We think the doctrine is inapplicable to the case. The appointment of the mayor and the defendant's assumption of office thereunder, made him an officer *de facto* merely. "An officer *de facto*," says Chancellor Walworth, "is one who comes into a legal and constitutional office, by color of a legal appointment or election to that office." *People v. White*, 24 Wend. 518, 539. The proceeding of the mayor in removing Nichols was so far judicial as to authorize it to be reviewed on *certiorari*. It was not a proceeding in a court of justice under the forms and solemnities of judicial proceedings in courts, to establish the rights of litigants. The defendant did not acquire his title to the office under the so-called judgment rendered by the mayor, but under a separate and distinct proceeding subsequent thereto, by which the defendant became invested with the character of

an officer de facto. It is abundantly settled by authority that an officer de facto can as a general rule assert no right of property, and that his acts are void as to himself unless he is also an officer de jure. *Green v. Burke*, 23 Wend. 490; *People v. Nostrand*, 46 N. Y. 375; *Bronson, J., in People v. Hopson*, *supra*. * * *

In the *Dolan* case (*supra*), the appointment of Keating was made under an ambiguous statute, under a claim of right, and was regular in form, but the court were of opinion that this would not protect him against a suit by the officer de jure to recover the salary received by him. We think there is no solid distinction between the cases. The defendant took the risk of the validity of his title, and the loss should fall upon him rather than upon the plaintiff.

Upon the whole case we are of opinion that the judgment should be affirmed.

CHAPTER IX.

LIABILITIES OF PUBLIC OFFICERS.

Liability of Subordinate Officer Acting Under Superior.

TRACY v. SWARTWOUT.

10 Pet. 80 (U. S.). 1836.

Liability of subordinate officer for act done in accordance with instructions of superior.

McLEAN, J., delivered the opinion of the court:

This case was brought into this court by a writ of error to the Circuit Court of the Southern District of New York. The suit was prosecuted in that court, to recover damages from the defendant, who, as collector of the customs, had refused to allow the plaintiffs to enter and receive the payment of the lawful duties, on certain casks of syrup of sugar cane, which they had imported into the port of New York. It is admitted that the law imposed no more duty on the article than fifteen per cent. ad valorem, although the collector, acting under the instructions of the Secretary of the Treasury, required bond for the payment of the above duty, or, should it be required, a duty of three cents per pound. No bond was given, and the syrup remained in the possession of the collector for a long time, by which means its value was greatly deteriorated. The question for consideration arises out of a bill of exceptions in which the evidence is stated at large, showing the quality of the syrup, the number of gallons imported, and the refusal of the defendant to take bond for the fifteen per cent. ad valorem duty.

It was admitted by the counsel of the plaintiffs that the defendant acted throughout with entire good faith, and under instructions from the Treasury Department. The plaintiffs' counsel offered to prove that they were unable to give bonds for duties at three cents per pound, though they did not state that fact to the defendant at the time they offered to make the

entry. The court overruled this testimony, and instructed the jury "that, admitting the merchandise in question was only subject to an ad valorem duty of fifteen per cent. yet the circumstances under which the dispute about the rate of duties arose ought not to subject the collector to the payment of more than nominal damages; that the collector was pursuing what he believed to be the true construction of the law, and whatever injury the plaintiffs may have sustained, in not receiving their goods at an earlier day, grew out of their own conduct in not entering the goods in the manner offered by the collector, at fifteen per cent. ad valorem, taking the bond, however, to receive the payment of three cents per pound, if such should be the legal rate of duties demandable, merely placing the case in a situation to have the question judicially decided, as to the rate of duty, no intimation, at the time, being given that it would occasion any inconvenience to the plaintiffs to give the bond so required by the collector." Under this construction, the jury found a verdict for six cents damages and six cents costs.

There can be no doubt that the Circuit Court decided correctly in overruling the evidence of inability in the plaintiffs to give the bond demanded by the defendant. The materiality of this evidence is not perceived; and if it had been material it ought not have been received, unless the fact of inability had been made known to the defendant at the time the bond was required.

The collector of the customs is a ministerial officer. He acts under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws. Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts? The Circuit Court, in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct. The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with, or alter, any of its provisions. It would be a most dangerous principle to establish that the acts of a minis-

terial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law, by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced, in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done he is not liable to exemplary damages; but he can claim no further exemption where his acts are clearly against law. The collector has a right to hold possession of imported goods until the duties are paid or secured to be paid as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them, after the duties shall be paid, or bond given or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.

Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instruction of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship. The judgment of the Circuit Court must be reversed, and the cause remanded to that court for further proceedings.

Liabilities of Election Inspectors.

GILLESPIE v. PALMER.

20 Wis. 572. 1866.

Character of duties of election inspectors. Liability for erroneously rejecting a vote. Not necessary to allege malice.

DOWNER, J. It is contended by the respondents that the complaint is defective because it does not aver malice on their part in rejecting the vote. Chapter 7, Rev. St., prescribes the duties of the respondents as inspectors, and they are, in substance, that it shall be the duty of each inspector to challenge every person offering to vote, whom he shall know or suspect not to be duly qualified as an elector. One of the inspectors may then administer to the person offering to vote an oath that he will truly answer such questions as shall be put to him

touching his residence and qualifications as an elector. If the person refuse to take the oath, or to answer any of the questions put to him, his vote is to be rejected; but if he take the oath and answer the questions, however false may be his answers, and however clearly they may show that he has no right to vote, and he still insists upon voting it is their duty to tender to him the oath prescribed in § 36 of the act, and, if he takes it, to receive his vote. If he swears falsely, or votes without the requisite qualifications, he may be, on conviction, punished. But if he takes the oaths, and answers the questions put, there is no discretion with the inspectors. They are mere ministerial officers; certainly far from being judicial. The registry act provides in substance that any one may have his name registered as a voter upon taking the same oaths and giving the same information required for voting.

If the inspectors are mere ministerial officers, then we see no good reason why the general principle of law, that a ministerial officer is liable for a wrong done by him acting in his official character, though without malice, should not be applied. It is held otherwise, however, in England, in New York, and some other states. The reason of these decisions appears to be that the inspectors of elections are intrusted with a discretionary authority, and are quasi-judicial officers. In Massachusetts and Ohio it is held the action will lie without malice. *Lincoln v. Hapgood*, 11 Mass. 350; *Blanchard v. Stearns*, 5 Metc. (Mass.) 298; *Harris v. Whitcomb*, 4 Gray (Mass.) 433; *Jeffries v. Ankeny*, 11 Ohio 373; *Anderson v. Millikin*, 9 Ohio St. 568. Some of these decisions are based partly on the state statute law regulating elections, as being different from the English law, but mainly upon the necessity of protecting the highly valued privilege of voting when the law has provided no other remedy. We adopt the rule of these decisions.

Judgment for plaintiff.

Exemption of Legislators from Liability for Torts.

COFFIN v. COFFIN.

4 Mass. 1. 1808.

To what extent does the privilege of members of the legislature protect them when sued for slander uttered in the legis-

lative hall, but having no bearing upon any motion or resolution before the house?

PARSONS, C. J. The plaintiff has commenced an action of the case, demanding damages of the defendant for an injury to his character by the defendant in maliciously uttering and publishing defamatory words which imported that the plaintiff had committed felony by robbing the Nantucket bank.

To this demand the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because, as he alleged, at the time when they were spoken, he and Benjamin Russell were members of the house of representatives then in session, and that he spoke the words to Russell, in deliberation in the house, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations, and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on trial, and it appeared from the evidence that when the words were spoken, the defendant and Russell were members of the house of representatives, then in session. The occasion, manner and circumstances of speaking them are thus related by Russell, the witness. He having some acquaintance with the plaintiff and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant, in his place, inquired where Russell had the information of the facts on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to Russell, and asked him who was the respectable gentleman, from whom he had received the information he had communicated to the house; Russell

answered carelessly, he was perhaps one of his relations, and named Coffin, as most of the Nantucket people were of that name. The witness then, perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him and said, "What, that convict?" Russell, surprised at the question, asked the defendant what he meant; he replied, "Don't thee know the business of Nantucket bank?" Witness said, "Yes, but he was honorably acquitted." The defendant then said, "That did not make him less guilty, thee knows." It further appears that this conversation passed a little before one o'clock, that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russell, and passed, or the subject matter of it, was ever after called up in the house.

The twenty-first article of the Declaration of Rights declares that "the freedom of deliberation, speech and debate in either house of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation, or prosecution, action or complaint in any other court or place whatsoever." On this article the defendant relies for his justification. * * *

In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect the privilege here secured resembles other privileges attached to each member of another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived by a resolve of the house, or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their

representatives to execute the functions of their office, without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution of the office; and I would define the article, as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber. * * *

Was Coffin, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he acting as a representative? If he was, he is entitled to the privilege he claims. If he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject matter of the resolution, or of the information, was not in fact before the house; although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage way, conversing with several gentlemen; the defendant came to him, and enquired the name of Russell's informant, who, he had declared, was a respectable gentleman from Nantucket. Was this enquiry, thus made, the act of a representative, discharging his duty, or of a private citizen, to gratify his curiosity? It was the former, say the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence, the defendant was answered; whatever was his motive, he had received the information. If upon it, he intended again to call up the resolution, he might have done it. But no motion, for that purpose, was ever

made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary; and that his motive might be to dissuade Russell from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot therefore assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman; and to justify the correction, by asserting that an honourable acquittal, by the verdict of a jury, is not evidence of innocence. It is not therefore possible for me to presume that the defendant, in using, thus publicly, the defamatory words, even contemplated that he was in the discharge of any official duty.

Liability for Bribery of an Officer.

STATE v. GARDNER.

54 Ohio St. 24. 1896.

One may be convicted of bribing an officer, though the officer, because of the unconstitutionality of a statute, has no legal authority to perform the act for the performance of which the bribe is offered.

BRADBURY, J. At the September term of the court of common pleas of Summit county, Omar N. Gardner was indicted for offering a bribe to Joseph Hugill, a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office, was unconstitutional and void. The demurrer was sustained and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and * * * has brought the question to this court for review. Two questions are presented by the record. 1. Whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not, and 2, if unconstitutional whether its constitutionality may be assailed in the col-

lateral way undertaken by the accused. The first question which logically arises, is the latter of the two; for if the accused should not be allowed to raise the question, in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked, is a question of the utmost importance in the practical administration of government affairs. Different courts have decided the question differently. * * *

If the official acts of officers, acting in an office created by an unconstitutional statute, should be regarded as falling within the principle that sustains the acts of *de facto* officers, until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no *de facto* officer, unless there is a *de jure* office. That is a simple and summary way to dispose of this grave question. That there can be no *de jure* officer without a *de jure* office is a proposition to which all minds will, of course, assent. But that there can be no *de facto* officer without a *de jure* office, is disputable, if the phrase "*de facto* officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every one. While in such occupancy innumerable official acts, affecting both public and private rights, may have been actually performed by them; the duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893; it superseded an act passed in the year 1891 for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown, also rests upon the act now assailed. While that of the city of Springfield depends upon an act, at least as vulnerable to the same attack, as the act under

consideration. The constitutionality of the governments of the cities of Springfield and Youngstown have not been assailed, even collaterally, and may continue unchallenged for many years. The officers who in these cities occupy offices created by the act upon which the city government rests, are daily discharging duties affecting the rights of the city and the private rights of individuals. These officers are either usurpers or trespassers, or *de facto* officers. If the latter, the rights of the public, or of individuals who have submitted to their authority, or acquiesced in its exercises, would be unaffected by a subsequent authoritative judicial declaration that the statute was unconstitutional; if they were usurpers merely, every official act would be a nullity, and interminable confusion possibly follow such a decision. Were such results to follow, the court might well pause before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to *de facto* officers had its origin in England; it was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence; whatever office parliament chose to create was a *de jure* office. In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute, regularly enacted by the legislative branch thereof, may, in express terms, create a public office, or it may authorize a municipal corporation to create one; an incumbent may be appointed in the mode prescribed by the statute, he may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely—possibly for many years—during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of persons, and of the public, that accrued before the law was declared void.

We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think that such officers might aptly be called "de facto officers." They actually performed official acts authorized by an act solemnly enacted by the law-making department of the government. Such a statute is presumed to be constitutional. *Railroad v. Commissioners of Clinton County*, 1 Ohio St. 77. The unbroken current of authority supports this proposition.

Courts in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office created under the provisions of a statute regularly enacted by that branch of the government to which power to make laws has been delegated by the constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them de facto officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that, therefore, the question of the constitutionality of the statute in question was not before the court of common pleas.

Liability of School Officers for Excluding Children from School.

POTTS ET AL. v. BREEN ET AL.

167 Ill. 67. 1897.

School directors liable for excluding children from public schools for refusing to be vaccinated, unless there is imminent

danger of an epidemic. The facts sufficiently appear in the opinion of the court.

CARTER, J. These are two suits between the same parties, one a petition for a writ of mandamus to compel appellants to admit appellees to the public school of their district, and the other an action of trespass to recover damages for the exclusion of appellees from such school. The cases were tried together upon the following facts agreed upon, viz.:

Jennie Breen and Jim Breen, appellees, were the children of Michael Breen, a resident and taxpayer of district No. 5, township 2, range 12, Lawrence county, Ill., of which district the appellants were directors. These directors, acting under a certain rule and order of the state board of health, made a general order, applicable to all schools in their district, requiring that all pupils should be vaccinated before being admitted to such school in question, to impart no instruction to appellees until they should comply with said order; and appellees were refused admission to the school on the sole ground that they had failed and refused to comply with such order, the father of appellees absolutely refusing to permit his children to be vaccinated. The directors acted in good faith, under the belief that they were performing a duty imposed upon them by law, and used no direct force upon appellees, but simply denied them admission to the school, after repeated refusals to obey the orders relating to vaccination.

In their answer to the petition, the directors alleged that the state board of health made and promulgated the following order: "Resolved, that, by the authority vested in this board, it is hereby ordered that on and after January 1, 1882, no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination;" and that at the January meeting, 1894, the said state board of health passed the following resolution: "Resolved, that the power of the state board of health, under the law creating said board of health, to order the vaccination of all school children, is clear and unquestionable. The consequent duty of the board of school directors to see that such order is strictly enforced in their respective districts is equally clear, and the said order of the board of health is their sufficient authority for

so doing." These orders of the state board of health were sent to the superintendent of schools of said Lawrence county, and were by him transmitted to the appellants, with written directions of the state board of health to enforce the same; and appellants made an order that all children attending the said school in their district should be vaccinated, or should show a physician's certificate of previous vaccination, as a condition of attendance upon the said school.

The trial court rendered judgment against appellants, granting the peremptory writ of mandamus as prayed, and assessed appellees' damages in the trespass case at one cent. These judgments have been affirmed, on appeal, by the Appellate Court, and appellants have prosecuted this appeal to this court. So far as the record discloses, appellees had not been exposed to infection by smallpox, but were in perfect health, and there was no reason for their exclusion except that they had not been vaccinated. There was no epidemic of smallpox prevailing or apprehended in the vicinity of the school.

The record presents the question whether or not the state board of health, or the appellants, as such school directors, acting under its orders or otherwise, had any power to impose, as a condition of the admission of appellees to the public schools, the requirement of vaccination; and, further, if such power existed, and could be enforced as a police regulation, for the preservation of the public health, and to prevent the spread of contagious and infectious diseases, was the regulation and its enforcement, under the facts appearing in the record, a reasonable one?

It is clear that no such power as claimed by the state board of health has been conferred upon it, unless by the broad and general language of the first section of the act creating it. But the general terms there employed must be construed in relation to the more specific duties imposed and powers conferred by the act taken as a whole, and, when thus construed, these general terms are restricted so as to express the true intent and meaning of the Legislature. Take, for example, the first sentence, viz.: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state." The scope of the language there employed is practically unlimited, and were it not held to be restricted by well-known legal

principles, applicable in the interpretation and construction of statutes, it would appear to confer more power on this board than the Legislature itself possessed. Plainly, it was not intended that any general supervisory power over the health and lives of citizens of the state should be exercised by the board otherwise than in conformity to law, and such as should be necessary, within reasonable limitations, in the performance of the administrative duties which were or should be imposed upon the board by statute. It had and could have no legislative power. Its duties were purely ministerial, and the provision of the statute authorizing the board to make such rules and regulations as it should from time to time deem necessary for the preservation or improvement of the public health cannot be held to confer that broad discretionary power contended for, to prescribe conditions upon which the citizen of the state may exercise rights and privileges guaranteed to him by public law.

In *Huesing v. City of Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129, it was contended that the city had the power, under clause 78, sec. 1, art. 5, of the city incorporation act, to construct and maintain a city abattoir, as a sanitary measure. This clause is as follows: "To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." This court, however, held that, in view of the fact that the same section contained other provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, the general provision did not enlarge the powers conferred by the special provisions.

As recently held by the Supreme Court of Wisconsin in a similar case, we are of the opinion that the powers of the board are limited to the proper enforcement of statutes, or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health, and to prevent the spread of contagious or infectious diseases. It will be observed that after the first section the powers and duties of the board with reference to different subjects are minutely specified, and it is required "to make reports to the Governor, and to include therein such information concerning vital statistics, and such knowledge respecting diseases, and such instruction on the subject of hygiene as may be thought

useful by the board for dissemination among the people with such suggestions as to legislative action as they may deem necessary." Its duty to recommend legislation is repeated more than once in the act, in connection with specifications of the powers and duties of the board; and from no point of view can we regard it as having been within the legislative intent to confer, by the first section, plenary powers upon the board in all matters pertaining to the public health, without regard to other provisions of the statute, or further action by the Legislature.

Section 1 of article 8 of the Constitution provides that "the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." And the statute provides that the directors "shall establish and keep in operation for at least one hundred and ten days of actual teaching in each year * * * a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure to all such children the right and opportunity to an equal education in such schools." And the statute further provides that they shall adopt and enforce all rules and regulations for the management and government of the schools, and may suspend or expel pupils who may be guilty of gross disobedience or misconduct. The statute also contains provisions of similar import relating to schools in more populous districts and cities. It is therefore seen that the right or privilege of attending the public schools is given by law to every child of proper age in the state, and there is nowhere to be found any provision of law prescribing vaccination as a condition precedent to the exercise of this right.

Whether the Legislature has the power to make such a requirement or not, it is not necessary here to consider; it is sufficient that it has not done so, and it cannot be supposed that the Legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights, unless he shall submit his body to be inoculated with vaccine virus, as a mere precaution against some possible future contagion of smallpox. It is doubtless true that in a large number

of school districts in interior parts of the state no case of small-pox has ever existed in the history of the state, and yet, by this order of the board, no citizen who has children to educate, although compelled by law to pay taxes to support the public schools, can send his children to such schools without first having such child vaccinated, as a precaution against a disease which had never appeared, and where there was no apparent danger that it would ever appear in the vicinity.

The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guaranteed to the citizen by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity or reasonable grounds upon which to conclude that such necessity exists, the power does not exist. As such the board of health has no more power over the public schools than over private schools or other public assemblages, and its order applying to public schools only, requiring vaccination as a prerequisite to the exercise of the right to attend a public school, could be justified only upon reasonable grounds appearing that the contagion of small-pox would more likely originate in or be disseminated from the public schools than from other assemblages. Whether it might be invested with power in this respect is a question not involved here, and not necessary to consider.

While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects nowise subject to the direction or control of the state board of health, and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also children infected or exposed to smallpox may be temporarily excluded, or the school may be temporarily suspended; but, like the exercise of similar power in other cases, it is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases.

No one would contend that a child could be permanently excluded from a public school because it had been exposed to

smallpox, or that the school could be permanently closed, because of the remote fear that the disease of smallpox might appear in the neighborhood, and that, if the school should then be open and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the Legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

We are not called upon to consider whether or not vaccination is a preventative, or the best known preventative, of smallpox. That it is so seems to be the consensus of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we can only so regard it; but, when compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. However fully satisfied, by learning and experience, a board might be that antitoxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be. * * *

The judgment of the Appellate Court affirming the judgment of the circuit court is affirmed.

CHAPTER XI.

CONTROL OF COURTS OVER PUBLIC OFFICERS.

Mandamus to Compel Officers to Levy a Tax.

STATE EX REL. CARPENTER v. THE SUPERVISORS OF THE TOWN OF BELOIT.

21 Wis. 282. 1866.

The plaintiff seeks mandamus to compel the three supervisors to levy a tax. Two of them had not qualified or performed any official acts. The court held that this did not, as contended by the plaintiff, make them *de facto* officers.

DIXON, C. J. It is of the very essence of this proceeding that there be some officer or officers in being, having the power and whose duty it is to perform the act. If there be no such officers, it is obvious that the writ cannot go, nor the mandate of the court be enforced. It is conceded that the chairman alone cannot levy the taxes; but it is claimed that the other two persons elected, but who neglected to qualify, became supervisors *de facto* by virtue of such election, and can be compelled to act as such in the performance of the duty enjoined by the writ. To this point the case of *Coles County v. Allison*, 23 Ill. 437, is cited. The case holds no more than this: that the acts of officers *de facto* are valid as respects the public and third persons having an interest in them and that they cannot be collaterally impeached. The trustees there elected at the second election, though irregularly perhaps, were held to be officers *de facto*, inasmuch as they had, in the language of the report, "qualified, and ever since exercised the functions of their office." That was sufficient, in the opinion of the court, to show a valid organization of the town. In this case, however, the other two supervisors elected not only failed to qualify, but it does not appear that they have ever assumed to act as such in any manner whatever. The statute declares that every office shall become vacant

on the refusal or neglect of the incumbent to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law. R. S. ch. 14, sec. 2. The other two persons elected are, therefore, neither supervisors de jure nor de facto; and the offices are vacant. * * *

BY THE COURT.—Peremptory writ refused.

Injunction to Prevent Removal from Office.

IN RE SAWYER ET AL.

124 U. S. 200. 1888.

Federal courts may not enjoin mayor and council from removing a police judge from office. Where they proceed in disregard of an injunction issued by the U. S. Circuit Court and are imprisoned for contempt they are entitled to be released on a writ of habeas corpus, as the Circuit Court acted without jurisdiction.

GRAY, J. The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of habeas corpus is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481, 484-487, 16 L. Ed. 198; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Heine v. Levee Com'rs*. 19 Wall. 655, 22 L. Ed. 223.

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the

removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; *Gee v. Pritchard*, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; *Attorney General v. Insurance Co.*, 2 Johns. Ch. (N. Y.) 371, 378.

From long before the Declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe v. Saunders*, Holt. 136, 6 Mod. 16.

Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: "This court has not originally and strictly any restraining power over criminal prosecutions." And again: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." *Mayor, etc., v. Pilkington*, 2 Atk. 302, 9 Mod. 273; *Montague v. Dudman*, 2 Ves. Sr. 396, 398.

The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to

restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney General v. Cleaver*, 18 Ves. 211, 220; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 Ch. App. 64; *Kerr v. Preston*, 6 Ch. Div. 463.

Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, affirms the same doctrine. 2 Story, Eq. Jur. 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state, or under municipal ordinances.
* * *

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow School, within its undoubted jurisdiction over public charities, was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." *Attorney General v. Clarendon*, 17 Ves. 491, 498.

In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

Upon a bill in equity in the Court of Chancery of the state of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the Governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an

account of fees, until the plaintiff's title to the office could be tried at law, Vice-Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or a decree of ouster of the office." But he overruled a demurrer, upon the ground that the bill showed a prima facie title in the plaintiff. *Tappan v. Gray*, 3 Edw. Ch. (N. Y.) 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the Court of Chancery had no jurisdiction or power to afford him any relief." 9 Paige 507, 509, 512. And the Chancellor's decree was unanimously affirmed by the Court of Errors, upon Chief Justice Nelson's statement that he concurred with the Chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by quo warranto. *Hagner v. Heyberger*, 7 Watts & S. (Pa.) 104, 42 Am. Dec. 220; *Updegraff v. Crans*, 47 Pa. 103.

The Supreme Court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. *Cochran v. McCleary*, 22 Iowa 75.

In *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by quo warranto or mandamus.

In *Sheridan v. Colvin*, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in great part the opening propositions of *Kerr on Injunction*, said: "It is elementary law that the subject-matter of the jurisdiction of a Court of Chancery is civil property. The court is conversant only with questions of property and the maintenance of civil

rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the Court of Chancery; nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247.

Upon like grounds it was adjudged in *Dickey v. Reed*, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in *Harris v. Schryock*, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was political, and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city: "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the state that he believes the charges to be true." No formal answer or replication is required, "but, if there be an answer and reply, the provisions of this (the?) statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and, if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter

vacant, and the clerk shall enter a copy of the judgment in the election book." Neb. Comp. St. c. 18, art. 2, 7.

The nature of this proceeding before county commissioners has been the subject of several decisions by the Supreme Court of the state. In the earliest one the court declared: "The proceeding is quasi-criminal in its nature, and the incumbent undoubtedly may be required to appear without delay, and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." *State v. Sheldon*, 10 Neb. 452, 456, 6 N. W. 757.

The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska which requires that "the judicial power of this state shall be vested in a Supreme Court, district courts," and other courts and magistrates therein enumerated. Const. Neb. art. 6, 1; *State v. Oleson*, 15 Neb. 247, 18 N. W. 45. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the Supreme Court of the state. * * *

This view does not substantially differ from that taken in other states, where similar orders have been reviewed by writ of certiorari, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. * * *

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by quo warranto or mandamus. * * *

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order for the disregard of which they are in custody, is to prevent his removal from the office of police

judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.

The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance); that the charges were referred by the mayor to a committee of three members of the council, that upon notice to the accused, and his appearance before that committee, he objected that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges, and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and, in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant, and appoint another person to fill it.

The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office.

It has been contended by both parties, in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State v. Sheldon*, 10 Neb. 452, 456, 6 N. W. 757, before cited. But, if the proceeding is

of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity.

If those proceedings are not to be considered as criminal or quasi-criminal, yet if, by reason of their form and object, and the acts of the legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the state, they are to be considered as proceedings in a court of the state (of which we express no decisive opinion), the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress that the writ of injunction shall not be granted by any court of a state, except when authorized by a bankrupt act. * * *

But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity.

The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States, and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.

In any aspect of the case, therefore, the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but, if it act without authority, its judgments and orders are regarded as nullities.

They are not voidable, but simply void." *Elliott v. Peirsol*, 1 Pet. 328, 340; *Wilcox v. Jackson*, 13 Pet. 498, 511.

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court, because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. *Prig v. Adams*, 2 Salk. 674, Carth. 274; *Fisher v. Bassett*, 9 Leigh (Va.) 119, 131-133, 33 Am. Dec. 227; *Navigation Co. v. Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202. Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity in deciding that in the particular matter before it there could be no full, adequate, and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is, that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the state and city from trying and determining. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution, which was *coram non judice*, or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. * * *

The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void,

their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged.

• • •

Mandamus to Compel Restoration to Head of Civil Service List.

BROWN v. RUSSELL.

166 Mass. 14. 1896.

One who as a result of a civil service examination is placed at the head of the list of eligibles for appointment is entitled to a writ of mandamus for the purpose of compelling the commissioners to restore his name to the head of the list though they have placed that of a veteran at the head in conformity to a statute. Such a statute held unconstitutional.

FIELD, C. J. In determining the principal questions in this case, it is necessary to consider the statutes relating to the civil service, and particularly St. 1895, c. 501. * * * It is obvious that the civil service statutes and rules relate only to certain subordinate offices and employments which have been created by the legislature. None of them is an office or employment of which the duties, tenure, or qualifications are prescribed by the Constitution.

In the present case the petitioner is not a veteran, and, after examination, was placed at the head of the list of candidates eligible for certification and appointment to a position on the detective force of the district police of the Commonwealth, and he remained at the head of the list until July, 1895, when the commissioners placed one Edward D. Bean at the head of the list, and reduced the petitioner to the second place. Bean had made application as a veteran, under St. 1895, c. 501, § 2, and, having been found to be a veteran, was without examination placed first upon the list; and so far as appears, he is the only veteran on the list. The district police are appointed by the Governor of the Commonwealth, and are subject to removal by the Governor. Pub. Sts. c. 103, § 1. If the Governor makes requisition upon the commissioners for a candidate for appointment to the office of a detective upon this police force, it is made the duty of the commissioners, by the St. of 1895, to certify the name of Edward D. Bean for appointment, and of the

Governor to appoint him, if he appoints anybody. The Governor, perhaps, may refuse to appoint anybody, if he is of opinion that Bean is not qualified to perform the duties of a detective on this force; or he may wait until more veterans than one are on the list of persons eligible to such an appointment, and make his selection from them; or he may appoint Bean, and remove him if he finds him incompetent. But then, if Bean is continued on the list, and is the only veteran on it, or if his application is considered as exhausted by one certification and he makes a new application, the statutes, liberally construed, make it the duty of the commissioners to put his name again at the head of the list for appointment, and on requisition by the Governor again to certify him for appointment, and so on, toties quoties, so long as he remains on the list.

It is to be noticed that the class of veterans, as defined by the statutes, is not a class which anybody can become qualified to enter by any services which he may perform, or by any attainments which he may acquire, but it is a class fixed and determined by services which were rendered a long time before any of the statutes were passed. It is also to be noticed that the fact of having been a veteran within the meaning of the statute in and of itself has little tendency to show that the applicant is specially qualified to perform the duties of many of the offices to which the civil service statutes and rules relate. The principal purpose of exempting veterans from submitting to an examination must be that veterans sometimes may be appointed to an office or employment who would be found on examination not qualified to perform the duties of the office or employment which they seek. One, and perhaps the chief, purpose of the exemption must be to reward veterans for their services in the war of the rebellion. The reward is not in the nature of a pension or payment of money, but of an office or employment, the salary or pay of which the veteran is to receive. The provisions of the statutes exempting veterans are general in their nature, and relate to all the offices or employments that have been or may be included within the civil service rules. From the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the state, particularly in war. These honors and offices have been conferred upon persons voluntarily selected,

and pensions and rewards sometimes have been given to whole classes of persons, of which the statutes of the Commonwealth relating to the "Aid to soldiers and sailors and to their families," and the statutes of the United States relating to pensions are well known examples; but the statute of 1895 under consideration affords the first instance, so far as we know, in this Commonwealth, where the appointing power has been compelled to appoint persons of a certain class to office in preference to all other persons, whether they are or are not thought to be qualified for the office by the appointing power, or by some public officer or some impartial and disinterested board of officers or persons invested by law with the power and responsibility of determining the qualifications of the persons to be appointed.

The Legislature, in establishing offices not provided for by the Constitution, has often required that the persons or some of the persons to be appointed shall possess certain qualifications, or that some of them shall be women and some men, but in all cases, so far as we are aware, the qualifications required bear such a relation to the duties imposed that they tend to secure that kind and degree of knowledge, experience, and impartiality which are requisite for the satisfactory performance of the duties, and it is open to any person to acquire the qualifications required. When women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done. In every case some discretion usually has been left to the appointing power in the selection of the particular persons to be appointed. The peculiarity of the civil service statutes and rules, if St. 1895, c. 501, §§ 2 and 6, be enforced, is that very little is left to the discretion of the appointing power in the selection of persons if there are veterans who wish to be appointed. The civil service commissioners, in making up the list and in certifying the persons to be appointed, must proceed in a certain way designated by the statutes and the rules, and the appointments must be made, if at all, from the persons so certified. Before the passage of St. 1895, c. 501, it was in the discretion of the appointing power whether veterans who had been put upon any list without an examination pursuant to St. 1887, c. 437, should or should not be certified for appointment by the commissioners, and it was also in the discretion of the appointing power whether, if such veterans were certified,

they should be appointed. But if veterans make application under St. 1895, c. 501, § 2, they are to be preferred "for certification and appointment in preference to all other applicants not veterans, except women," and, as separate lists are made up for the different offices and employments, appointments from each list must be made from veterans, if any man is appointed, and if there are veterans on the list. * * *

It is the contention of the petitioner that the privileges given to veterans by the St. 1895, c. 501, §§ 2 and 6, are in violation of the principles which underlie our system of government implied in the Constitution of the Commonwealth, and also are in violation of certain express provisions of the Constitution.
* * *

Article 7 is as follows: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore, the people alone have an incontestable, unalienable, and inalienable right to institute government; and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it."

This article is declarative of the ends of the institution of government. It may be said to be fairly within the intent of this article that public offices, which are the instrumentalities of government, ought not to be created or filled for the profit, honor, or private interest of any one man, family, or class of men, but only for the protection, safety, prosperity, and happiness of the people, and for the common good.

Article 6 is as follows: "No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge is absurd and unnatural." * * *

In our opinion, the meaning of these words in this article, so far as they are applicable to public offices, is that only on consideration of services to be rendered to the public therefor can a man, corporation, or association of men obtain advantages

or particular and exclusive privileges distinct from those of the community. A person may obtain the advantages or privileges attached to a public office in consideration of his performing the duties of the office. It is for the purpose of rendering service to the public in a public office that advantages and privileges distinct from those of the community may be obtained. The meaning of this article was somewhat considered in *Hewitt v. Charier*, 16 Pick. 353, and it was held that St. 1818, c. 113, was not in violation of the article. It was there held that the leading purpose of that statute was to guard the public against ignorance, negligence, and carelessness in the practice of physic and surgery, and that the exclusive privileges granted to such persons as shall have been licensed by the officers of the Massachusetts Medical Society, or have been graduated doctors of medicine from Harvard University, were only incidental to the leading purpose of the statute. In that case, as in others where a license is required before any one can engage in certain professions or pursuits, a service is rendered to the public by the exercise on the part of those licensed of the skill, knowledge, and experience required to obtain a license, and by the exclusion of ignorant and incapable persons from the profession or pursuit. But it may be questioned whether this article of the Declaration of Rights was intended to apply to private pursuits and employments, and whether it is not to be confined to political and civil rights and privileges. * * *

The purpose of St. 1895, c. 501, §§ 2 and 6, is to make the appointment of veterans compulsory, if they desire to be appointed, whether the appointing power or the commissioners think they are or are not qualified to perform the duties of the office or employment which they seek. * * *

The principal question of law in this case, broadly stated, is therefore as follows: Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments? If such legislation is not constitutional as regards public offices, the question incidentally may arise, whether a distinction can

be made between public offices and employments by the public which are not offices.

Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare. In offices which are created by the Legislature, where the method of appointment is not prescribed by the Constitution, the Legislature, if no limitation is put upon its power by the Constitution, can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards, or upon the inhabitants of cities, towns, or districts; but we think that it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices.

There are many employments by the Commonwealth, or by the cities and towns of the Commonwealth, which do not constitute the employee a public officer. The work of the Commonwealth, and of the cities and towns, must be done by agents or servants, and much of it is of the nature of an employment.

* * *

The persons appointed to the detective department of the district police force of the Commonwealth, under Pub. Sts. c. 103, and the acts in amendment thereof, are public officers, and not merely employees of the Commonwealth. They are appointed by the Governor for the term of three years, subject to removal by the Governor, and they "have and exercise throughout the Commonwealth all the powers of constables (except the service of civil process), police officers, and watchmen, and may be transferred from one district to another; and the Governor may at any time command their services in suppressing riots and in

preserving the peace." Pub. Sts. c. 103, § 2. They give bonds to the Treasurer of the Commonwealth and receive a stated salary from the treasury of the Commonwealth. They have and exercise some of the powers of government. We are of opinion that §§ 2 and 6 of St. 1895, c. 501, so far as they purport absolutely to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office, cannot be upheld as enactments within the constitutional power of the General Court.

The result is, that the commissioners were not authorized by St. 1895, c. 501, §§ 2 and 6, without an examination, to place the name of Edward D. Bean at the head of the list to be certified for appointment upon the detective force of the district police of the Commonwealth in preference to all other applicants not veterans or women; and that they should be commanded to strike his name from the list.

Finality of Judgment of Equalization Board.

STATE RAILROAD TAX CASES.

92 U. S. 575. 1875.

MILLER, J. There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

The statute requires the proper officers of the railroad companies to furnish to the State Auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the Auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been

increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they may raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.

Power of Court to Control the Executive.

STATE OF GEORGIA v. STANTON.

6 Wall. 50 (U. S.). 1867.

Supreme court without jurisdiction to enjoin executive from acting under authority of "Reconstruction Acts."

NELSON, J. By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," etc., and, as applicable to the case in hand, "to

controversies between a state and citizens of another state," which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction—that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry, is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress, which, it is charged if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them, and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting

any act or thing, within or concerning the state, which is or may be directed or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true the bill, in setting forth the political rights of the state and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, state capitol and executive mansion, and other real and personal property, and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground nor is it noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendant.

Bill dismissed for want of jurisdiction.

CHAPTER XII.

TERMINATION OF THE OFFICIAL RELATION.

Power of Removal.

DULLAM v. WILLSON.

53 Mich. 392. Decided in 1884.

What constitutes sufficient notice and hearing? The facts sufficiently appear in the opinion of the court which was delivered by Justice Champlin:

The issue is whether, under the constitution and laws of Michigan, the Governor has power to remove a state officer by such action as was taken in this case, viz.: An act of removal evidenced by writing, under the hand and seal of the executive, filed in the executive office, with notice thereof to the officer removed, communicating to him the alleged grounds of removal, but without giving him notice of charges, complaint or claim of official misconduct or neglect of duty, or opportunity of hearing, or defense.

The Constitution (article 12, § 8) provides that "the Governor shall have power and it shall be his duty, except at such times as the Legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty or for corrupt conduct in office, for any other misfeasance, or malfeasance therein, either of the following state officers, to wit: The Attorney General, or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired terms of office, and report the causes of such removal to the Legislature at its next session." This provision was not contained in the Constitution of 1835. It was added to the present Constitution, by amendment, by the Legislature of 1862 (Laws 1861, p. 588), ratified by the people in 1862.

It will be observed that the section of the Constitution under consideration only authorizes the Governor to remove for specified causes. He is not authorized to exercise the power at his pleasure or his caprice. It is only when the causes named exist that the power conferred can be exercised. It follows as a necessary consequence that the fact must be determined before the removal can be made. It is also clear that the fact must be determined by some tribunal invested with judicial power, for a determination whether specified causes exist is the exercise of judicial functions. Judicial determination of facts must rest upon and be preceded by notice, proof and hearing. And the first question is, what is the proper tribunal in which such facts are to be ascertained? In my opinion this provision of the Constitution requires no legislation to make it effective. Read in the light of the history of the times, and the surrounding circumstances when it was adopted, the grant of power is to the Governor coupled with the duty enjoined to examine into the condition and administration of any public office, and to examine into the acts of any public officer, and to remove from office for gross neglect of duty, or for corrupt conduct in office, any of the officers specified. The amendment for this purpose clothes him with judicial power. It is implied in the grant and without it the grant would be nugatory and ineffectual to accomplish the purposes for which it was given.

The counsel for the respondent, while granting this, insist that such removal cannot be made without charges, notice and an opportunity for defense, and this I consider the important question in the case.

Unless it is the manifest intention of the section under consideration that the proceedings should be ex parte as well as summary, a removal without charges, notice and an opportunity for defense cannot be upheld. The exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our free institutions. I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man.

In *Ramsay's Case*, 18 Ad. & El. (N. S.) 190, it was said: "The Chancellor has authority to remove a judge of a county

court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused. He cannot legally act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehavior; and where evidence has been given in support of them we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor acting within his jurisdiction, being the constituted judge upon this subject." In *Williams v. Bagot*, 3 B. & C. 786, Mr. Justice Bayley said: "It is contrary to common justice that a party should be concluded unheard." The case of *The Queen v. The Archbishop of Canterbury*, 1 El. & El. 545, arose under a statute which enacted that a curate, whose license shall have been revoked by the bishop, might "appeal to the archbishop of the province, who should confirm or annul such revocation as to him shall appear just and proper." An appeal was taken to the archbishop, who, without giving the appellant an opportunity to be heard, confirmed the revocation. Lord Campbell said: "No doubt the archbishop acted most conscientiously, and with a sincere desire to promote the interests of the church, but we all think that he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without being heard." Mr. Justice Wightman said "that, *ex debito justitiae*, every one has a right to be heard before he is condemned."

An act of Parliament gave authority to the bishop to decide, upon affidavit or upon his own knowledge, whether or not the duties of the parish had been inadequately performed, in consequence of the negligence of the incumbent, and whenever it shall so appear to his satisfaction he could, by certain proceedings, appoint a curate in place of the incumbent. The bishop, proceeding upon his own knowledge, without notice or an opportunity afforded to the incumbent, adjudged that the duties of the vicarage of the parish were inadequately performed by reason of the vicar's negligence, and proceeded to appoint another person to the place. The incumbent refused to surrender to the new appointee. Lord Lyndhurst held that the language of the act imported inquiry, and a judgment as the result of that inquiry. He said: "He is to form his judgment. It is to

appear to him from affidavits laid before him; but, is it possible to be said that it is to appear to him and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defense—without having an opportunity even of being summoned for that purpose—as in the present instance; there being no summons, for the action was proceeded in immediately, without any intimation whatever from the bishop of his intention to proceed, to the party against whom that requisition proceeds.” And he further held that when the bishop proceeded, “on his own knowledge, the same course of proceeding is necessary, because a party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense.” *Capel v. Child*, 2 Cr. & J. 558.

The line of authority is not by any means exhausted, but enough cases have been cited to show that the action of the Governor in this case cannot be upheld as a legal and proper exercise of the power conferred upon him. There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing. What length of time notice should be given we do not determine; it must depend, in a great measure upon the circumstances of each case.

I have carefully examined the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of

those cases does not commend itself to my judgment. They appear to me to be opposed, not only to the decided weight of authority, but also to the fundamental principles of justice. In what I have said upon the law of this case I have not cast the least imputation upon the motives of the executive. The same presumptions of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the other co-ordinate branches of the government, and his motives are not the subject of criticism. I have no doubt that he acted under the impression that he was entirely within the line of his duty as well as of law, and that he believed that the removal of respondent was demanded by the best interests of the public service.

Be that as it may, the relator has not made out a case for the intervention of the court, and judgment must be entered for respondent.



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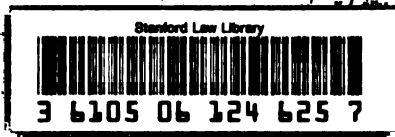
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